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Third meeting
Montreal, 19-23 February 2007
Item 4 of the provisional agenda*

Compilation of Submissions of Further Views and Proposed Operational Texts With Respect to Approaches, Options and Issues Identified as Regards Matter Covered by Article 27 of the Protocol**

The Executive Secretary is circulating herewith, for the information of participants in the third Open-ended *Ad Hoc* Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety, a compilation of submissions of further views and proposed operational texts with respect to approaches, options and issues identified as regards matter covered by Article 27.

* UNEP/CBD/BS/WG-L&R/3/1.

** The submissions are reproduced in the form and the language in which they were received by the Secretariat.

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[SUBMISSION: ENGLISH]

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"No strict liability could be alleged by the affected party."

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"Liability shall be excluded/mitigated when damage was caused under the following circumstances:

a. Act of God/force majeure; or
b. Act of war or civil unrest; or
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COLOMBIA [16 OCTOBER 2006]
[SUBMISSION: SPANISH]

Puntos de vista de Colombia sobre los textos operacionales respecto a los enfoques, opciones y temas identificados como asuntos cubiertos por el Artículo 27 del Protocolo de Cartagena sobre Seguridad en la Biotecnología

1. *Anexo II. I.A. Ámbito funcional*

Consideramos que la redacción de la opción 2 es más precisa.

2. *Anexo II. I.C. Cuestiones por considerar más a fondo*

No son claras las limitaciones que se consagran en este punto, si son limitaciones a la responsabilidad y cuáles son sus efectos, teniendo en cuenta además que en el punto V del mismo anexo, se tienen como cuestiones por considerar más a fondo la limitación del tiempo (a), y de la "cantidad" (b).

3. *Anexo II. II.A. Componentes facultativos de la definición de daños*

Sugerimos la siguiente redacción:

(a) Daños a la conservación y utilización sostenible de la diversidad biológica o a sus componentes;
  (i) Determinación de la pérdida de biodiversidad: […]
  (ii) Formulación de un umbral cualitativo del daño a la conservación y uso sostenible de la diversidad biológica;
(b) Daños al medio ambiente;
  (i) Perjuicios a la calidad del suelo;
  (ii) Perjuicios a la calidad del agua;
  (iii) Perjuicios a la calidad del aire;
(c) Daños a la salud humana;
  (i) Perjuicios a la salud;
  (ii) Pérdida de la vida o lesiones personales;
(d) Daños socioeconómicos, especialmente en relación con comunidades indígenas y locales;
  (i) Pérdida de ingresos;
  (ii) Pérdida económica;

(iii) Perjuicios a valores culturales, sociales y espirituales;
(iv) Perjuicios a la seguridad alimentaria;
(v) Reducción o pérdida de la competitividad;
(vi) Perjuicios a la propiedad privada;

4. *Anexo II. II.C. Cuestiones por considerar más a fondo*

Debe incluirse en este punto, para considerar más a fondo necesariamente, los criterios que servirán para establecer el tipo de daño en cada uno de los componentes facultativos de su definición, lo cual determinará también la responsabilidad y la forma de reparación o compensación según el caso.

5. *Anexo II. IV.A. Posibles enfoques para la canalización de la resposabilidad sine delicto,* (a).

Si bien la responsabilidad para actos internacionalmente ilícitos continúan aplicándose las normas generales del derecho internacional para responsabilidad *ex delicto* del Estado, será necesario elaborar las normas que se aplicarán en el marco del Protocolo de Cartagena y concretamente, a los casos de infracción de las obligaciones consagradas en el mismo.

Si lo que se quiere establecer es que en los casos de responsabilidad sine delicto se aplicarán las normas generales del derecho internacional pertinentes, estamos de acuerdo con que no es necesario elaborar normas especiales (i), pero insistimos en que resulta conveniente que se estipule así en las reglas y procedimientos, tal como se propone en el numeral (ii) de este punto.

6. *Anexo II. IV.A. Posibles enfoques para la canalización de la resposabilidad sine delicto,* (b).

Antes de determinar la responsabilidad que tendrán los Estados *sine delicto*, consideramos conveniente analizar cuáles serán los casos en los que se causen daños con actos que no están prohibidos por la ley internacional, o bien, que están acordes con las obligaciones del Protocolo, teniendo en cuenta las definiciones de daños estipuladas anteriormente y los criterios para el efecto. Partiendo de esto, será más fácil la labor de decidir el alcance de la Responsabilidad de los Estados.

7. *Anexo II. IV.B.1. Factores posibles para determinar el estándar de responsabilidad y la identificación de la persona responsable.*

El grado de riesgo que involucra un tipo específico de OVM debe ser también un factor para determinar el tipo de daño.

8. *Anexo II. IV.B.3. Exenciones o mitigación de la responsabilidad estricta*

Estamos de acuerdo con que se establezcan casos de mitigación de responsabilidad, concretamente para los eventos listados en la Opción 2. Teniendo en cuenta que la responsabilidad será de los Estados, consideramos que no habrá lugar a la exención o mitigación de la responsabilidad por el "cumplimiento de medidas compulsorias impuestas por una autoridad nacional competente" (d), por el "permiso de una actividad por medio de la ley aplicable o una autorización específica otorgada al operador" (e), en atención al artículo 2.1 del Protocolo de Cartagena.

9. *Limitación de la Responsabilidad; VI. Mecanismos de Seguros Financieros*

El Gobierno de Colombia apoya la necesidad de seguridad financiera obligatoria (Opción 1) con base en el hecho de que este elemento es la mejor garantía para que a la víctima se le garantice compensación completa y a tiempo.

10. *Anexo II. VII. "Liquidación de demandas" (Settlement of Claims)*

En opinión de Colombia, este punto necesitará una discusión más profunda y detallada. No obstante, es importante señalar que no es claro el alcance del término 'facultativo', si denota la facultad de acudir a estos procedimientos excluyendo en ese caso los mecanismos del Protocolo, o bien, si este punto se refiere a los procedimientos internos que podrán o deberán agotarse antes de acudir al procedimiento de reparación del Protocolo de Cartagena. Tampoco es claro el uso que se le da al término "interestatales" ("Inter-State"), por cuanto el texto pareciera indicar que se habla de los procedimientos o recursos internos, caso en el cual, no son acertados los términos utilizados hasta el momento.

11. *Anexo II. VIII. Capacidad/Derecho a presentar demandas*

En este punto deberían tenerse como cuestiones por considerar más a fondo: sujetos con capacidad para presentar las demandas, los requisitos para hacerlo, mecanismos, procedimientos, presupuestos o requisitos mínimos para hacerlo, órganos encargados de atender las mismas, entro otros que se consideren pertinentes.

12. *Anexo II. XII. Elección del Instrumento*

La preferencia de Colombia es por un instrumento jurídicamente vinculante. De acuerdo con el artículo 27 del Protocolo de Cartagena, las normas y procedimientos podrían constar en un anexo que haría parte integral del Protocolo, sin perjuicio de los trámites que deba surtirse al interior de cada una de las Partes para su entrada en vigor, o la forma que se acuerde para que cada Parte manifieste su consentimiento en obligarse por el instrumento.

ETHIOPIA [29 SEPTEMBER 2006]
[SUBMISSION: ENGLISH]

PROTOCOL ON LIABILITY AND REDRESS FOR DAMAGE RESULTING FROM THE TRANSBOUNDARY MOVEMENTS OF A GENETICALLY MODIFIED ORGANISIM AND ITS PRODUCT

The Parties to this Protocol have agreed as follows:

1. OBJECTIVE OF THE PROTOCOL

The objective of the Protocol is to provide a regime for liability as well as for adequate and prompt compensation for damage resulting from LMOs or its product in the field of the safe transfer, handling and use of LMOs resulting from modern biotechnology, specifically focusing on transboundary movement, transit, handling and use, including illegal traffic.

2. SCOPE OF APPLICATION

1. This Protocol shall apply to damage due to any occurrence, or series of occurrences having the same origin that causes damage or creates a grave and imminent threat of causing damage during transboundary movement, transit, handling and use of LMOs, including illegal traffic from the point where the LMOs are loaded on the means of transport in an area under the national jurisdiction of a Party of export.

2. The Protocol shall apply only to damage suffered in an area under the national jurisdiction of a Contracting Party or in areas beyond any national jurisdiction arising from an incident referred under subarticle 1 of this Article.

3. The Protocol shall not apply when neither the state of export nor the state of import is a contracting party.

3. GENERAL OBLIGATIONS

1. Each Contracting Party shall take due care and measures with a view to ensuring that transboundary movement, transit, handling and use of LMOs by its nationals or persons under its jurisdiction or control are carried out in conformity with the provisions of this and the Cartagena Protocol.

2. The granting of an advance agreement by the Party of import does not exonerate the Party of export from being answerable for any damage resulting during transboundary movement, transit, handling and use of LMOs, including illegal traffic.

3. Each Contracting Party shall, in respect to its nationals or persons under its jurisdiction or control, ensure the availability of adequate compensation for damage resulting from the failure to discharge the obligations contained in this or other relevant international laws during transboundary movement, transit, handling and use of any LMOs, including illegal traffic,.

4. The Party of export shall ensure the availability of effective remedies for any damage ensued in other states or areas beyond the limits of national jurisdictions as a result of its activities or of acts or omissions of any one of its organs during transboundary movement, transit, handling and use of LMOs, including illegal traffic.

5. The contracting Parties shall ensure that any person in operational control of LMOs or its product at the time of emergency or incident occurring within its jurisdiction has implemented the risk management plan specifically approved for the use, handling and transboundary movement of the LMOs in question.

4. STRICT LIABILITY

1. The Party of export that has notified to and obtained an advance informed agreement from the Party of import in accordance with Article 8 and 10 of the Cartagena Protocol shall be strictly liable for damage resulted in the Party of import, other states or areas beyond the limits of national jurisdictions until the importer has taken possession of the LMOs or its product. Thereafter the Party of import shall be liable for damage.

2. The Party of export shall be strictly liable for damage resulting from LMOs referred under article 7 (4) of the Cartagena Protocol only if the State of import or state of transit has categorized those LMOs as likely to have adverse effects on the conservation and sustainable use of biological diversity, entail risks to animal and human health and the
environment, and if same is notified to other Parties through the Biosafety clearing-House.

3. Should the LMOs be repatriated in accordance with Article 25 of the Cartagena Protocol, the Party that re-imports such LMOs shall be held strictly liable for damage until it has taken possession of the LMOs in question, if applicable, or by the disposer assigned to dispose of the said LMOs by the Party of import or transit.

4. The Contracting Parties shall not, oppose, hinder or prevent the return of the LMOs destined for repatriation to the Party of export in accordance with subarticle three of this Article.

5. No Contracting Party can be held liable under this Article if without their being any fault on its part the damage occurred:

(a) directly due to an act of armed conflict or a hostile activity except an armed conflict initiated by the Contracting Party that is responsible for the damage;

(b) directly due to a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character; or

(c) wholly by an act of third party; or wholly the result of the wrongful intentional conduct of a third party, including the person who suffered the damage.

5. FAULT BASED LIABILITY

1. Any person that commits fault either intentionally or by negligence during the transboundary movement, transit, handling and use of LMOs shall be liable for damage resulting from an incident other than those specified under Article 4 of this Protocol. This Article shall not affect the domestic law of the Contracting Parties governing liability of servant and agents.

2. A person that takes or fails to take action required under this Protocol or other relevant international laws with full knowledge or being aware of that its act or omission may cause damage shall be deemed to have committed an intentional fault if, with full knowledge of the consequences of the incident, it takes or fails to take action regardless of that such damage may follow.

3. A person is proved negligent when, in the circumstances of the case, it fails to take such precautions as might reasonably be expected or it acts without consideration or in disregard of the possible consequences of its act or omission during a transboundary movement, transit, handling and use of LMOs, including illegal traffic.

6. CESSATION, RESTITUTION AND COMPENSATION

1. Each Contracting party shall in conformity with the Cartagena Protocol and other relevant international law cease activities that might cause significant damage and shall, as far as practicable, re-establish the situation that would have existed if the damage had not occurred.

2. Where restoration is not possible as provided under subarticle one of this Article, the Contracting Party which is responsible for the origin of the damage shall provide other remedies or substitutes deemed equivalent or relevant to make good the damage.

3. Contracting Parties shall cooperate to develop and improve means to remedy damage resulting from transboundary movements of LMOs, including measures for rehabilitation, restoration or reinstatement of habitats of particular conservation concern.

7. INSURANCE AND OTHER FINANCIAL GUARANTES

1. The Party of export or any other person that will be strictly liable pursuant Article ----- herein shall establish and maintain during the period of the time of liability, insurance, bonds or other financial guarantees covering their liability for amounts not less than the minimum limits specified herein.

2. The Party of export may, by notifying a declaration of self insurance through the Biosafety clearing-House, fulfill its obligation provided under subarticle one of this Article.

3. Insurance, bonds or other financial guaranties provided under subarticle one of this Article shall only be drawn upon to provide compensation for damage.

4. Proof of coverage of the liability of the Party of export or any other person shall be delivered to the competent authorities of the state of import, and same shall be notified to parties through the Biosafety Clearing-House.

5. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under this Protocol to be joined in the proceedings. Insurer and persons providing financial guarantees may invoke the defenses which the person liable under this Protocol would be entitled to invoke.

8. FINANCIAL MECHANISM

1. Where compensation under this Protocol does not cover the costs of damage, additional and supplementary measures aimed at ensuring adequate and prompt compensation may be taken using existing mechanisms.

2. The Meeting of the Parties to the Cartagena Protocol shall keep under review the need for and possibility of improving existing mechanisms or establishing a new mechanism.

9. ACCESS TO JUSTICE

1. Each Contracting Party shall ensure that any person in another Contracting Party who is adversely affected has the right of access to administrative and judicial procedure equal to that afforded to nationals of the Contracting Party of origin in case of domestic environmental harm.

2. Each Contracting Party shall ensure that adversely affected persons due to damage resulted during transboundary movement, transit, handling and use of LMOs, including illegal traffic, have a right of recourse for the wrongful act of that person or entity associated with the Party of export.

3. Claims for compensation under this Protocol may be brought in the courts where either the damage was suffered or the incident occurred or the plaintiff has his habitual residence or the defendant has his principal place of business.

4. Each contracting Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

10. RELATION WITH THE LAW OF THE COMPETENT COURT

1. Subject to subarticle two of this Article, nothing in the Protocol shall not affect any rights of persons who have suffered damage, or considered as limiting the protection or reinstatement of the environment which may be provided under domestic law.

2. No claims for compensation for damage based on the strict liability of the notifier or the exporter shall be made otherwise than in accordance with the Protocol.

11. MUTUAL RECOGNITION AND ENFORCEMENT OF JUDGMENTS

1. Any judgment of a court having jurisdiction in accordance with Article --- herein, which is enforceable in the State of origin, shall be recognized in any Contracting Party, except where the judgment was obtained by fraud, the defendant was not given reasonable notice and a fair opportunity to present his case, the judgment is irreconcilable with an earlier judgment validly pronounced in another Contracting Party with regard to the same cause of action and same parties, or the judgment is contrary to the policy of the Contracting Party from which this recognition is sought.

2. A judgment recognized under subarticle one of this Article shall be enforceable in each Contracting Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merit of the case to be re-opened.

3. The provisions of subarticle one and two of this Article shall not apply between Contracting Parties that are Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgments under which the judgment would be recognizable and enforceable.

12. BILATERAL, MULTILATERAL AND REGIONAL AGREEMENTS

1. The Protocol shall not apply to any damage resulting from an incident occurring during transboundary movement, transit, handling and use of any LMOs, including illegal traffic pursuant to a bilateral, multilateral or regional agreement or arrangement concluded and notified in accordance with Article 14 of the Cartagena Protocol if:

(a) the damage occurred in an area under the national jurisdiction of any of the Parties to the agreement or arrangement;

(b) there exists a liability and compensation regime, which is in force and is applicable to the damage arising from such a transboundary movement provided that it fully meets, or exceeds the objective of the Protocol by providing high level of protection to victims that have suffered damage;

(c) The Contracting Party that has entered into bilateral, regional and multilateral agreements and arrangements pursuant to Article 14 of the Cartagena Protocol in which the damage has occurred has previously notified through the Biosafety Clearing-House of the non-application of the Protocol to any damage occurring in an area under its national jurisdiction.

(d) the parties to the bilateral, regional and multilateral agreements and arrangements entered into pursuant to Article 14 of the Cartagena Protocol have not declared that the protocol shall be applicable;

2. The exclusion as set out under subarticle one of this Article shall neither affect any of the rights or obligations under the Protocol of a contracting Party which is not party to the agreement or arrangement mentioned above, nor shall it affect rights of States of transit which are not contracting Parties.

13. MORE STRINGENT MEASURES

1. The provisions of this Protocol shall not affect the right of Contracting Parties individually or jointly to adopt and implement more stringent measures than those required under this Protocol.

2. The provisions of this Protocol shall not prejudice any strict obligation which Contracting Parties have entered into or may enter into under existing or future treaties.

3. Whenever the provisions of this Protocol and the provisions of a bilateral, multilateral or regional agreement apply to liability and compensation for damage caused by an incident arising during the same portion of an incident, the Protocol shall not apply provided that the other agreement is in force for the Contracting Party or Parties concerned and had been opened for signature when the Protocol was opened for signature, even if the agreement or arrangement was amended afterwards.

14. COMBINED CAUSE OF DAMAGE

1. Where damage is caused by LMOs subject to the Advance informed agreement and LMOs identified as being not likely to have adverse effects pursuant Article 7(4) of the Cartagena Protocol, a person otherwise liable shall only be liable according to the Protocol in proportion to the contribution made by the LMOs covered under the Advance informed agreement.

2. In respect of damage where it is not possible to distinguish between the contribution made by LMOs covered by and LMOs identified as being not likely to have adverse effects pursuant Article 7(4) of the Cartagena Protocol, all damage shall be covered under this Protocol.

3. If there is more than one person responsible for the damage, injury or loss, the claimant shall have the right to seek full compensation from any or all of the persons liable for the damage, injury or loss.

15. CONTRIBUTORY FAULT

Compensation may be reduced or disallowed if the victim or a person for whom he is responsible under the domestic law, by his own fault, has caused or contributed to the damage having regard to all circumstances.

16. FINANCIAL LIMIT

1. There shall be no upper financial limit of liability and thus the damage shall be fully compensated.

2**.** In the case of harm to the environment or biological diversity, compensation shall include the costs of reinstatement, rehabilitation or clean-up measures which actually are being incurred and, where applicable, the costs of preventive measures.

17. CIVIL CLAIMS FOR DAMAGE

1. Any person who has suffered loss or harm during a transboundary movement, transit, handling and use of any LMOs, including illegal traffic, may institute a civil claim for damages in court, which may include a claim for:

(a) economic loss resulting from the release of LMOs and its products or from activities undertaken to prevent, mitigate, manage, clean up or remediate any harm from such incident;

(b) costs incurred in any inspection, audit or investigation undertaken to determine the nature of any release of LMO or to investigate risk management options.

2. For the purpose of this protocol damage means

(a) loss of life or personal injury

(b) loss of or damage to property other than property held by the person liable in accordance with this Protocol

(c) loss of income directly deriving from economic interest in any use of the environment, incurred as a result of impairment of the environment, taking into account savings and costs

(d) the costs of measures of reinstatement of the impaired environment, limited to the costs of measures actually taken or to be undertaken

3. In the case of harm to human health, compensation shall include:

a) all costs and expenses incurred in seeking and obtaining the necessary and appropriate medical treatment;

b) compensation for any disability suffered, for diminished quality of life, and for all costs and expenses incurred in reinstating, as far as possible, the quality of life enjoyed by the person before the harm was suffered;

c) compensation for loss of life and all costs and expenses incurred and other related expenses;

4. Liability shall also extend to harm or damage caused directly or indirectly by the LMO or its product to:

a) the livelihood or indigenous knowledge systems of local communities,

b) technologies of a community or communities,

c) damage or destruction arising from incidence of public disorder triggered by the LMO or its product,

d) disruption or damage to production or agricultural systems,

e) reduction in yields,

f) soil contamination,

g) damage to the biological diversity,

h) damage to the economy of an area or community, and

any other consequential economic, social or cultural damages

18. MPLEMENTATION

1. The Contracting Parties shall adopt the legislative and administrative measures necessary to implement the Protocol.

2. The Contracting Parties shall inform through the Biosafety Clearing-House of measures taken to implement the Protocol, including any minimum limits of liability established pursuant to Article 8 herein.

3. The provisions of the Protocol shall be applied without discrimination based on nationality, domicile or residence.

19. TIME LIMIT OF LIABILITY

1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from the date of incident.

2. Claims for compensation under the Protocol shall not be admissible unless they are brought within five years from the date the claimant knew or ought reasonably to have known of the damage provided that the time limits established pursuant to subarticle one of this Article is not exceeded.

3. Where the incident consists of a series of occurrences having the same origin, time limits established pursuant to this Article shall run from the date of the last of such occurrences. Where the incident consists of continuous occurrences, such time limits shall run from the end of that continuous occurrence.

4. The right to bring civil action in respect of harm caused by any LMO or its product shall commence from the date on which the affected person(s) or the community or communities could reasonably be expected to have learned of the harm, taking due account of:

(a) The time the harm may take to manifest itself; and,

(b) The time that it may reasonably take to correlate the harm with the LMO or its product, taking into consideration the situation or circumstance of the person(s) or community or communities affected.

20. A RIGHT TO STANDING

1. Any person, group of persons, or any private or state organization is entitled to bring a claim and seek redress in respect of the breach or threatened breach of any provision of this Protocol, including any provision relating to damage to human health, biological diversity, the environment, or to socio-economic or cultural conditions of local communities or to the economy of the country:

(a) in that person's or group or class of persons' interest;

(b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;

(c) in the interest of, or on behalf of, a group or class of persons whose interests are affected;

(d) in the public interest; and

(e) in the interest of protecting the environment or biological diversity.

2. No costs shall be awarded against any of the above persons who fail in any action as aforesaid if the action was instituted reasonably out of concern for the public interest or in the interest of protecting human health, biological diversity or the environment.

3. The burden of proving that an action was not instituted out of public interest or in the interest of protecting human health, biological diversity or environment, rests on the person claiming that the case is otherwise.

EUROPEAN UNION [6 OCTOBER 2006]
[SUBMISSION: ENGLISH]

EU submission on Chapters IV to XI of Annex II contained in the Report of the 2nd Meeting of the Open-ended Ad hoc Working Group of Legal and Technical Experts on Liability and Redress (Doc. UNEP/CBD/BS/WG-L&R/2/L.1/Add.1)

As explained in Chapter XI below, the EU favours, as a first step, the adoption of a COP/MOP decision containing rules and procedures on liability and redress under Article 27 of the Cartagena Protocol. Therefore, any reference to 'this decision' in Chapters IV to XI below means a COP/MOP decision adopting the rules and procedures on liability and redress.

Chapter IV: Channelling of Liability

The EU fully acknowledges the applicability of the concept of State responsibility for internationally wrongful acts, including breach of obligations of the Protocol. There is no need to formulate special rules and procedures on state responsibility under Article 27 CPB [1]. Nor does the EU see merit in establishing primary or residual state liability in the rules and procedures under Article 27 CPB. Therefore, the EU favours a civil liability regime over a state liability regime.

On the basis of the polluter pays principle, there should be a workable and effective regime. Strict liability under a civil liability regime should be channelled to one person; this may be the operator[2]/importer. This system of channelling should not, however, prejudice the right of recourse of the operator/importer against the exporter, in particular in cases where it is so provided expressly by contract or where the damage caused results from an act or omission that is imputable to the exporter.

A second tier is desirable. The choice for the modalities of a second tier is related to the question of supplementary collective compensation arrangements and should therefore be addressed together with that issue. Exemptions/defences should be included to limit strict liability in some specific cases.

Parties implementing this decision may choose to combine a civil liability approach with an administrative approach. An administrative approach would focus on the prevention and remediation of environmental damage by establishing a number of obligations on operators/importers and on public authorities.

Operational text:

1. The operator/importer of a transboundary movement of LMOs should be liable for the damage resulting from such a transboundary movement.

2. If two or more operators/importers are liable according to this decision, the claimant should have the right to seek full compensation for the damage from any or all operators/importers i.e. the latter should be liable jointly and severally without prejudice to domestic provisions concerning the rights of contribution or recourse.

3. The operator/importer who proves that only part of the damage was caused by the transboundary movement of LMOs should only be liable for that part of the damage.

4. The operator/importer should not be liable to the extent that the damage was caused by an act of God/force majeure, an act of war or civil unrest, the intervention by a third party or compliance with compulsory measures imposed by a public national authority.

5. Where appropriate, the operator/importer may not have to bear the costs of remedial action when he proves that he was not at fault or negligent and the damage was caused: 1) by an activity expressly authorised by and fully in conformity with an authorisation given under national law; 2) by an activity not considered likely to cause environmental damage according to the state of scientific and technical knowledge at the time when the activity was carried out.

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[1] The rules and procedures should not affect the rights and obligations of the Parties under international law with respect to the responsibility of States, as reflected by GA Res 56/83, 'Responsibility of States for internationally wrongful acts'.

[2] In, for example, the EC Environmental Liability Directive (2004/35/EC) "operator" is defined in the following way: 'any natural or legal, private or public person who operates or controls the occupational activity or, where this is provided for in national legislation, to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity or the person registering or notifying such an activity.'

6. Nothing in this decision shall prejudice any right of recourse of the operator/importer against the exporter.

7. In case civil liability is complemented by an administrative approach, the operator/importer should be required to take all necessary preventive and remedial measures and to bear their costs. Competent public authorities should establish which operator/importer has caused the damage (or the imminent threat of damage). They should assess the significance of the damage and determine which remedial measures should be taken. Competent authorities may themselves also take the necessary preventive or remedial measures and then recover the costs from the operator/importer.

Chapter V: Limitation of liability

Both relative time limits and absolute time limits should be included in the rules and procedures.

Operational text:

1. A claim for damages under these rules and procedures should be exercised within [x] years from the date by which the claimant knew or ought reasonably to have known of the damage and the person liable, in any event not later than [x] years from the date of the transboundary movement of LMOs.

2. Where the transboundary movement of LMOs consists of a series of occurrences having the same origin, time limits under this rule should run from the date of the last such occurrence. Where the effect of the transboundary movement consists of a continuous occurrence, such time limits should run from the end of the continuous occurrence.

Chapter VI: Mechanisms of Financial Security

A. Coverage of liability

The EU has stated its concerns with regard to the experience of other international agreements on liability which have not been successful as the mechanisms of financial security proved to be unavailable. Thus, in the view of the EU, careful consideration should be given to this issue. As the EU is strongly in favour of a two-stage approach with regard to the elaboration of rules and procedures on liability under Article 27 of the Cartagena Protocol, we would like to include various options into this decision as a first step and explore their workability in practice first. For the EU the primary goal is to create an effective and workable system.

Therefore, the EU suggests that this decision should identify options which could be implemented at the domestic level. As the situation will vary to a large extent between the Parties of the Cartagena Protocol, different approaches may be pursued and adopted. Based on the experience gained in practice, further consideration might be given by the Parties on whether it seems plausible to advise in favour of one or the other mechanism of financial security.

B. Supplementary collective compensation arrangements

The EU does not exclude exploring supplementary approaches, in exceptional cases such as major accidents or disasters, to compensate for certain damages that could not be redressed otherwise. We would favour Option 2 and propose to enter into a dialogue with the biotechnology industry in order to elaborate criteria for a fund to be financed by contributions from the biotechnology industry. It would be very helpful if Parties, in establishing liability rules at the domestic level, would enter into a dialogue with stakeholders in order to explore the most appropriate solution for specific national situations.

Chapter VII: Settlement of Claims

As the EU favours a two-stage approach we wish to address the settlement of claims at the domestic level. We wish to address disputes between operators/importers and victims under a civil procedure and/or to compensate for damages under an administrative procedure.

Furthermore, consideration might be given to make use of special tribunals, such as the Permanent Court of Arbitration and its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment.

The use of special tribunals to deal with individual cases may raise a number of issues, such as the practical accessibility of such tribunals for individuals due to the costs involved. They might prove to be an effective means of dispute settlement in case of major accidents involving a large number of victims.

In case civil liability is complemented by an administrative approach, it might be necessary to provide for dispute settlement provisions between the operator/importer and the public authority.

Operational text:

1. Civil law procedures should be available at the domestic level to settle claims between operators/importers and victims. In cases of transboundary disputes, the general rules of private international law will apply as appropriate. The competent jurisdiction is generally identified on the basis of the defendants' domicile. Alternative grounds of jurisdiction may be provided for well-defined cases, e.g. in relation to the place where a harmful event occurred. Special rules for jurisdiction may also be laid down for specific matters, e.g. relating to insurance contracts.

2. Resorting to special tribunals, such as the Permanent Court of Arbitration and its Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment, may be considered in specific cases such as when a large number of victims are affected.

3. In case civil liability is complemented by an administrative approach, decisions of public authorities imposing preventive or remedial measures should be motivated and notified to the addressees who should be informed of the legal remedies available to them and of their time limits.

Chapter VIII: Standing/Right to bring claims

This question is closely connected to Chapter VII dealing with settlement of claims and usually is addressed by domestic legal systems.

Operational text:

1. Parties should provide for a right to bring claims by affected natural or legal persons as appropriate under domestic law.

2. In case civil liability is complemented by an administrative approach, natural and legal persons, including NGOs promoting environmental protection and meeting relevant requirements under domestic law, should have a right to require the competent authority to act according to this decision and to challenge, through a review procedure, the competent authority's decisions, acts or omissions as appropriate under domestic law.

Chapter IX: Non-Parties

The domestic law implementing this decision at the national level would, in accordance with private international law, have to address the case of damage resulting from LMOs imported from a non-Party. Conscious of Article 24 CPB and COP/MOP decisions BSI/11 and III/16, the EU considers that there is no need for special rules and procedures on non-Parties. The EU would like to stress that any regime should not provide an incentive to non-Parties not to ratify or adhere to the Protocol.

Operational text:
National rules on liability and redress implementing this decision should also cover damage resulting from the transboundary movements of LMOs from non-Parties, in accordance with Article 24 of the Cartagena Protocol and COP/MOP decisions BSI/11 and III/6.

Chapter X: Complementary Capacity Building Measures

It is important to consider the relationship between domestic liability regimes and international rules and procedures on liability and redress. Domestic liability regimes should provide the framework for the implementation of these international rules and procedures and it is through capacity building that domestic regimes could be initiated or further developed.

The EU is open to consider the development of specific complementary capacity building measures based on domestic needs and priorities for the design and implementation of domestic rules and procedures on liability and redress.

Operational Text:
1. The next review of the Updated Action Plan for Building Capacities for the Effective Implementation of the Cartagena Protocol on Biosafety, as contained in the Annex to decision BS III/3 should, as appropriate, take into account the present decision including capacity building measures such as assistance in the development of domestic "liability rules" and considerations such as "contributions in kind", "model legislation", or "packages of capacity building measures".

2. When Parties are in the process of developing their domestic legislative arrangements relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs, they may submit, through the Secretariat, draft legislative arrangements for advice to the [*Committee responsible for the facilitation of the implementation of this decision*].

3. Parties should submit to the Secretariat their domestic legislative arrangements relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs upon their adoption. The Secretariat shall bring all domestic legislative arrangements so received to the attention of the [*Committee responsible for the facilitation of the implementation of this decision*].

4. The [*Committee responsible for the facilitation of the implementation of this decision*] will:

(a) provide, at the request of a Party, advice to that Party on draft domestic legislation relating to rules and procedures in the field of liability and redress for damage resulting from transboundary movements of LMOs submitted to it in accordance with paragraph 2;

(b) provide, at the request of a Party, advice to that Party on questions relating to the implementation of this decision.

(c) report to each ordinary meeting of the COP/MOP on its activities;

(d) report to the seventh meeting of the COP/MOP on the implementation and effectiveness of this decision, including any recommendations for further action in this field, taking into account best practices.

Chapter XI: Choice of Instrument

The EU thinking on the preferred choice of instrument is driven by an aspiration to design a liability and redress regime that is promptly operational and which would apply to all Parties to the Protocol. These two objectives are best accommodated by taking a two-stage approach. That is to develop a regime by way of a COP/MOP decision, which would take effect, for all Parties, immediately upon adoption. This first stage would subsequently be evaluated, on the basis of which the development of a legally binding instrument could then be considered. Thus, the EU favours a two-stage approach and feels that only a COP/MOP decision should be adopted at this stage. Such a decision should incorporate the operational text here below as well as the operational text in Section X above. The decision should also, in an Annex, include the actual rules and procedures on liability and redress agreed by the COP/MOP.

Operational text:

1. The COP/MOP recommends the implementation of this decision by the Parties to the Cartagena Protocol in their domestic law. The international rules and procedures should be adjusted to the specific needs of each of the Parties, taking into account their different situations.

2. An evaluation of the effectiveness of this decision should take place at COP/MOP-7. It should be based on the experience gained with the liability systems adopted at the domestic level to implement this decision, with a view to strengthen the protection of potential victims and of biodiversity.

NORWAY [29 SEPTEMBER 2006]
[SUBMISSION: ENGLISH]

Norway submits its operational text proposals while underlining the following:

The relationship between the rules and procedures on liability and redress under the Cartagena Protocol and other international agreements and mechanisms will have to be further elaborated before a final position on the geographical scope of the rules are developed.

The rules and procedures on liability and redress under the Cartagena Protocol should cover state responsibility and liability in addition to civil liability.

I. Scope of "damage resulting from transboundary movements of LMOs"

A. Functional scope

Operational text proposal:

This instrument applies to transport, transit, handling and use of living modified organisms (LMO) that finds its origin in a transboundary movement. It applies to all LMOs covered by the Cartagena Protocol.

With respect to intentional transboundary movements, this instrument applies to damage resulting from any authorized use of the LMO, as well as any use in violation of such authorization.

This instrument also applies to unintentional transboundary movements and transboundary movements in contravention of domestic measures to implement the Protocol.

B. Optional components for geographical scope

Operational text proposal:

1. This instrument applies to:

a) Damage caused by a transboundary movement and suffered within an area under national jurisdiction or control of Parties to the instrument, and

b) Damage caused an operator of a State party to this instrument by a transboundary movement and suffered beyond areas of national jurisdiction or control, provided that it is caused by a transboundary movement of LMOs originating from an area covered by Point 1.

2. This instrument does not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to jurisdiction.

3. This instrument applies to damage caused by a transboundary movement of LMOs that started after the entry into force of this instrument.

4. For the purposes of this instrument, a transboundary movement starts from the following points;

a) In cases of sea borne transport, where a LMO leaves the exclusive economic zone of the State, or in the absence of such zone, the territorial sea of a State.

b) In cases of land borne transport, where a LMO leaves the territory of a State

c) In cases of air borne transport, where a LMO leaves the exclusive economic zone, the territorial sea or the territory of the State, depending on the route.

II. Damage

Operational text proposal:

Alternative 1

This instrument covers damage to conservation and sustainable use of biological diversity and to human health as follows:

1. *Damage to the conservation of biological diversity means any measurable significant change in the quantity or quality of organisms within species, of species as such or ecosystems.*
2. *Damage to the sustainable use of biological diversity means any quantitative or qualitative reduction of the component of biological diversity which negatively affect the continued use of those components in a sustainable way and thereby leads to economic loss, loss of, damage to, or impaired use of property, loss of income, disruption of the traditional way of life in a community or hinders, impedes or limits exercising of the right of common.*
3. *Damage to human health, including loss of life, personal injury, impairment of health, loss of income and public health measures.*

Alternative 2

1. "Damage" means:

a) Loss of life or personal injury;

b) Loss of or damage to property;

c) Loss of income directly deriving from an economic interest in the use of biological diversity, incurred as a result of impairment of the biological diversity, taking into account savings and costs;

d) The costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken;

e) The costs of preventive measures, including any loss or damage caused by such measures

2. "Measures of reinstatement" means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of biological diversity. Domestic law may indicate who will be entitled to take such measures;

3. "Preventive measures" means any reasonable measures taken by any person, in response to an incident, to prevent, minimize or mitigate possible loss or damage or to arrange for environmental clean-up.

B. Possible approaches to valuation of damage to conservation of biological diversity

Operational text proposal1:

In the valuation of the damage to conservation of biological diversity, the costs of measures of reinstatement or remediation of the impaired biological diversity actually taken or to be undertaken shall be taken into account, including introduction of original components or introduction of equivalent components on the same location, for the same use, or on another location for other types of use

C. Issues for further consideration ~~with respect to valuation of damage~~

Operational text proposal:

The Party affected by an intentional or unintentional transboundary movement of living modified organisms may require the person responsible for the movement to take reasonable preventive measures and measures of reinstatement.

If the person responsible fails to take the measures as required, the Contracting Party may undertake the measures at his expense.

III. Causation

Operational text proposal:

All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

IV. Channelling of liability, Role of Parties of import and export, Standard of liability

Operational text proposal:

Civil liability
The person responsible for intentional or unintentional transboundary movements of living modified organisms shall be liable for damages resulting from transport, transit, handling and/or use of living modified organisms that finds its origin in such movements, regardless of any fault on his part.

Any persons responsible for transboundary movements referred to in paragraph 1 above shall be jointly and severally liable for damages referred to in the same paragraph.

1 In case Operational text proposal, Alternative 1 under Part II A is chosen. The definition of "damage" under Operational text proposal, Alternative 2 makes further elaboration of approaches to valuation of such damage unnecessary.

Liability may be limited in cases where the person referred to in paragraph 1 above proves that the damage was:

1. *The result of an act of armed conflict, hostilities, civil war or insurrection; or*
2. *The result of a natural phenomenon of exceptional, inevitable, unforeseeable and irresistible character.*

State responsibility
This instrument shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.

V. Limitation of liability

Operational text proposal:

Claims for compensation under the Protocol shall not be admissible unless they are brought within 3 years from the date the claimant knew or ought reasonably to have known of the damage and the person responsible, and at the latest 20 years from the date on which the activity causing the damage ceased.

VI. Mechanisms of financial security

A. Coverage of liability

Operational text proposal:

The persons liable under Article X shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability in accordance with requirements set out in the regulatory framework of the party of import or the decision on the import of living modified organisms taken by a Party of import pursuant to Articles 10-12 of the Cartagena Protocol. The requirements shall take into account inter alia the likelihood, seriousness and possible costs of damage and the possibilities to offer financial security.

VII. Settlement of claims

Operational text proposal:

Competent courts

1. Claims for compensation may be brought in the courts of a Party only where either:

a) *The damage was suffered; or*
b) *The incident occurred; or*
c) *The defendant has his habitual residence or principal place of business.*

2. Each Party shall ensure that its courts possess the necessary competence to entertain such claims for compensation.

Related actions

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Parties, any court other than the court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established.

2. Where the jurisdiction of the court first seized is established, any court other than the court first seized shall decline jurisdiction in favour of that court.

3. Where related actions are brought in the courts of different Parties, any court other than the court first seized may stay its proceedings.

4. Where these actions are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

5. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.

Applicable law
All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

Relationship between the instrument and the law of the competent court
The instrument is without prejudice to any rights of persons who have suffered damage or to any measures for the protection or reinstatement of the environment that may be provided under applicable domestic law.

Mutual recognition and enforcement of judgements
1. Any judgement of a court having jurisdiction in accordance with Article X on competent courts which is enforceable in the State of origin of the judgement and is no longer subject to ordinary forms of review, shall be recognized in any Party as soon as the formalities required in that Party have been completed, except:

a) Where the judgement was obtained by fraud;
b) Where the defendant was not given reasonable notice and a fair opportunity to present his case;
c) Where the judgement is irreconcilable with an earlier judgement validly pronounced in another Party with regard to the same cause of action and the same parties; or
d) Where the judgement is contrary to the public policy of the Party in which its recognition is sought.

2. A judgement recognized under paragraph 1 of this Article shall be enforceable in each Party as soon as the formalities required in that Party have been completed. The formalities shall not permit the merits of the case to be re-opened.

3. The provisions of paragraphs 1 and 2 shall not apply between Parties to an agreement or arrangement in force on mutual recognition and enforcement of judgements under which the judgement would be recognizable and enforceable.

VIII. Standing/right to bring claims

Operational text proposal:

Applicable law
All matters of substance or procedure regarding claims before the competent court which are not specifically regulated in the instrument shall be governed by the law of that court, including any rules of such law relating to conflict of laws, in accordance with generally accepted principles of law.

IX. Non-Parties

No special rules and procedures proposed. The instrument is proposed to cover damage caused by a transboundary movement and suffered within an area under national jurisdiction or control of Parties to the instrument, regardless of whether the transboundary movements has its origin in a Party or non-Party. The

origin of the transboundary movements is only relevant for damage suffered beyond areas of national jurisdiction or control.

X. Complementary Capacity-Building Measures

No text proposal at present.

XI. Choice of Instrument

No text proposal at present.

THAILAND [1 NOVEMBER 2006]
[SUBMISSION: ENGLISH]

Further views in the form of Operational Texts with respect to Approaches, options and Issues Identified as Regards Matter Covered by Article 27 on Liability and Redress

(Referred to Annex II of BSWG-L&R-2 report, section IV to XI)

IV. Channeling of liability, role of parties of import and export, standard of liability

A. Possible approaches to channeling of liability

(a) State responsibility
There is a need to scope and limit the cases which specific rules and procedures under Article 27 of the Protocol that general rules of international law for State responsibility continue to apply. In other words, only some specific rules and procedures are obliged by both party and non-party countries to the Protocol.

(b) State liability
No state liability is needed.

(c) Civil liability
Civil liability is applied by harmonization and standardization of national rules and and procedures for liability, as appropriate.

(d) Administrative approaches based on allocation of costs of response measures and restoration measures.
(No proposal)

B. Issues relating to civil liability

1. Possible factors to determine the standard of liability and the identification of the liable person
(a) Type of damage (reversible or irreversible) to biodiversity
(b) Degree and extent (area and duration) of risk of LMOs to biodiversity
(c) Likelihood of unexpected adverse effects to biodiversity
(d) Clear and sufficient evidence of causal link of liable person to damage to biodiversity
(new proposal to replace original a-e)

2. Standard of liability and channeling of liability
A conditional strict liability is applied to channel to one or more of persons in chain. However, primary liable person shall strongly be burdened to the importer and supplier to the importing country. A causal link shall essentially be identified. No liability will be applied for the end-user and consumer of LMOs in the importing country.

3. Exemption to or mitigation of strict liability

The exemptions to or mitigations of strict liability;
(a) Act of God/force majeure
(b) Act of war or civil unrest
(c,d,e and f being proposed to be deleted)
4. Additional tiers of liability in certain situation:
The party might determine and require specific tiers of liability exercise, as appropriate, with a transparent requirement and notification to possible liable persons through Biosafety Clearing-House.
(proposed to delete original a-f)

5. Issues for further consideration
(a) Combination fault liability and strict liability; characteristic of fault and strict liability to damage to biodiversity should be further considered and agreed upon the parties.
(b) Recourse against third party by the person who is liable on the strict liability; Recourse might assist to allocate a liability along a causal link.
(c) Joint and several liability or apportionment of liability; If occurred, damage to biodiversity is extensive both in space and time, liability might be joint and portioned.
(proposed to delete original d)

V. Limitation of Liability
(proposed to delete)

VI. Mechanisms of financial security

A. Coverage of liability

Voluntary financial security is recommended by national competent authority. In addition, national competent authority might require compulsory financial security on a case-by-case basis whenever strict liability will be applied. A notifier shall provide financial security upon national competent authority requirement, if so.

B. Supplementary collective compensation arrangements

Private contribution for financial security from the developer and producer of LMOs is required. Their contribution might be a permit fee, an establishment of national biosafety fund, emergency response and remediation fund etc.

C. Issues for further consideration

(proposed to be deleted)

VII. Settlement of claims
Either of inter-state procedure, civil procedure, administrative procedure or special tribunal might be chosen and applied on a case-by-case basis as appropriate upon the parties. Combination of procedures to settlement of claims should be possible.

VIII. Standing/Right to bring claims
Criteria and conditions to trigger standing/right to bring claims might be further considered among the parties. The party, however, is able to trigger to bring claims in any reason, if damage to biodiversity occurs.

IX. Non-parties
A consideration and recommendation to the party of the Protocol is essential to guide a proposal of rules and procedures in other agreements with non-parties in order to be liable to damage to biodiversity. A proposed minimum requirement for non-parties might be agreed upon negotiation to assure liability and redress for the parties.

X. Complementary Capacity Building Measures

(a) Use of measures adopted under Article 22 of the Protocol

(b) Development of specific complementary capacity building measures, based on national needs and priorities

XI. Choice of Instrument

Two-stage approach with a clear timeframe proposal of each stage implementation and evaluation of a success/failure might be tested. Party shall exercise the chosen instrument in an effective manner for an appropriate time interval before an evaluation of success/failure of the instrument. A development of instrument by each party might differ, however, a harmonization and transparency of instrument by the parties is essential.

SUBMISSIONS FROM ORGANIZATIONS

GLOBAL INDUSTRY COALITION (GIC) [29 SEPTEMBER 2006]
[SUBMISSION: ENGLISH]

Submission of the Private Sector Users and Developers of Biotechnology in Response to Notification 2006-033 of 5 May 2006

This paper responds to the invitation to governments and organizations to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to the approaches, options and issues identified in Annex II to UNEP/CBD/BS/COP-MOP/3/10.

Because Annex II contains a mixture of elements of a liability regime and other issues (instrument/approach to be taken, capacity building, etc.) the private sector users and developers of modern biotechnology, represented by the GIC, strongly recommends that the work be reorganized for more efficient and logical consideration by the Liability and Redress Working Group. Each set of issues should be addressed in a separate paper and considered by the Group individually. At present, these include:

- Choice of Instrument (Section XI)
- Administrative Approaches (Section IV.A(d))
- Non-binding Approaches (Section XI. Option 3)
- Capacity Building Measures (Section X)
- Possible Elements of an International Liability Rules and Procedures (civil and/or state liability) (other remaining sections)
- Mechanisms of Financial Security (Section VI.)

The reason to separate these issues is that they constitute alternative or complementary approaches and/or components. To continue listing and considering them all as "elements" of liability rules and procedures does not make sense and creates confusion.

The GIC provides the following views and comments in the spirit of facilitating a full discussion without prejudice to their position on the need for, utility or fairness of developing liability and redress rules under the Protocol. Further, all of the Operational Text is interrelated: proposals are valid only where the related texts (e.g., scope, definition of damage, etc.) also are accepted.

The GIC wishes to emphasize the fact that numerous options remain for addressing liability under the Biosafety Protocol, as outlined in section XI below. Thus, the text provided on certain elements should be considered in the context of these various options, including guidelines or other non-binding instruments or a transnational process regime. The GIC has agreed to provide the suggested text below *not* in order to support the development of a legally binding liability regime, but to facilitate consideration of all available options under discussion.

Comments and Proposals related to Sections I – III

Section I.A.

Please move paragraph 4 of Operational Text 10 to Section I.C.(d).

Section I.C.(b)

New Proposed Operational Text:

These rules and procedures shall apply only to damage to biodiversity resulting from transboundary movements that occur following entry into force of these rules.

Section II.(a)

New Proposed Operational Text:

Damage covered under these rules and procedures is limited to damage to biodiversity

IV. CHANNELLING OF LIABILITY, ROLE OF PARTIES OF IMPORT AND EXPORT, STANDARD OF LIABILITY

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
A. Possible approaches to channelling of liability	(a) State responsibility (for internationally wrongful acts, including breach of obligations of the Protocol)	Party responsibility for wrongful acts that cause damage to the conservation and sustainable use of biological diversity resulting from the transboundary movements of LMOs should be ensured.	A Party shall be liable for damage to biodiversity resulting from any breach of its obligations under the Protocol.
	(b) State liability (for acts that are not prohibited by international law, including cases where a State Party is in full compliance with its obligations of the Protocol). Option 2 Residual State liability in combination with primary liability of operator Option 3 No State liability	Parties have the legal responsibility and obligation under the Protocol for reviewing and permitting the use of LMOs within their sovereign domain and for decisions/approvals for imports on the basis of a scientific risk assessment. If a Party is at fault, it is only logical that it bear the primary responsibility for any damage caused. Where both an operator and a Party are found to be at fault, Option 2 would be appropriate.	A Party shall be liable for failure to exercise reasonable care in carrying out its responsibilities pursuant to the Biosafety Protocol and national implementing legislation where such failure results in damage to biodiversity. Where another person also is at fault, liability shall be apportioned based on degree of fault.
	(c) Civil liability (harmonization of rules and procedures) (d) Administrative approaches based on allocation of costs of response measures and restoration measures.	Creation of a transnational process regime that helps to provide some harmonization of procedural aspects relating to liability for damage to the conservation and sustainable use of biodiversity and/or the administrative approach mentioned here merits further exploration. These are possible outcomes, however, not elements of a liability system.	Not applicable.

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
B. Issues relating to civil liability	1. Possible factors to determine the standard of liability and the identification of the liable person (a) Type of damage; (b) Places where damage occurs (e.g. centres of origin and centres of genetic diversity); (c) Degree of risk involved in a specific type of LMO as identified in risk assessment (d) Unexpected adverse effects	The normal standard of liability around the world for activities that are not inherently dangerous is fault-based liability. The transboundary movement of LMOs is not an ultra-hazardous activity requiring departure from this norm. To determine fault, courts must assess whether the defendant has breached his legal obligation or duty. The legal obligation or duty placed on technology developers is determined by the risk assessment process. The Parties have a legal obligation to review submissions, assess risk using sound science and make decisions regarding the permitting of LMOs. Persons or entities can only be held responsible for damage resulting from the realization of risks of which they were aware or should have been aware.	Liability shall be established where a person: (i) has operational control of the relevant activity; (ii) has breached a legal duty of care through intentional, reckless or negligent conduct, including acts or omissions; (iii) such breach has resulted in actual damage to biodiversity; and (iv) causation is established in accordance with section XX of these rules.
	(e) Operational control of LMOs (stage of transaction involving LMOs).	Operational control is a key factor in assigning liability: causation is the key to any liability system and must be clearly reflected in any rules to be developed. However, no predetermination of liability linked to specific "stages" of transactions can be made because where the fault lies, if at all, would depend on the facts and circumstances of a particular case. Therefore, no provision is appropriate.	No provision.

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	2. Standard of liability and channelling of liability (a) Fault-based liability: (i) Any person who is in the best position to control the risk and prevent the damage; (ii) Any person who has operational control; (iii) Any person who does not comply with the provisions implementing the Biosafety Protocol; (iv) Any entity who has the responsibility to put in place the provisions for implementing the Protocol (v) Any person to whom intentional, reckless or negligent acts or omission can be attributed	Any liability rules to be developed under the Protocol should be fault-based. Under this standard legal approach, liability can only be established over persons who had operational control and are found to have been at fault (intentional, reckless or negligent acts or omissions), based on proof of causation, for actual damage to biodiversity. Fault-based liability promotes care and preventive action both prior to commercialization and in the market place.	Liability shall be established where a person: (i) has operational control of the relevant activity; (ii) has breached a legal duty of care though intentional, reckless or negligent conduct, including acts or omissions; and (iii) such breach has resulted in actual damage to biodiversity; and (iv) Causation is established in accordance with section XX of these rules.

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	(b) Strict liability: Option 1 Liability to be channelled to one or more of the following persons, including persons acting on his or her behalf, on the basis of prior identification: (a) The developer (b) The producer (c) The notifier (d) The exporter (e) The importer (f) The carrier (g) The supplier Option 2 Liability to be channelled on the basis of establishment of a causal link.	Strict liability generally is reserved for activities that are ultra-hazardous and, therefore, is not appropriate in the context of liability rules relating to LMOs. There have been no cases of actual damage to biodiversity caused by LMOs to date, and it is widely recognized that activities involving LMOs are not inherently dangerous or ultra-hazardous. Furthermore, LMOs will have already undergone careful risk assessment procedures, multiple regulatory reviews, and be approved by the importing Party before their first transboundary movement. It should also be noted that strict liability inhibits development and deployment of new technologies because operators cannot avoid liability by exercising due care and rigorous product stewardship.	Liability shall be assigned on the basis of the establishment of a causal link between the damage to biodiversity and the intentional, reckless or negligent conduct of the person with operational control of the activity. Persons shall be held strictly liable for damage to biodiversity that results from acts or omissions in violation of national law or in violation of the written conditions of any approval.

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	3. Exemptions to or mitigation of strict liability Option 1 No exemptions. Option 2 Possible exemptions to or mitigations of strict liability (a) Act of God/force majeure; (b) Act of war or civil unrest (c) Intervention by a third party (including intentional wrongful acts or omissions of the third party)	The heading of this section incorrectly suggests that defenses and exemptions are relevant only to strict liability. Defenses and exemptions also are standard – and necessary – features in fault-based liability systems. The identified exemptions and defences for acts beyond the control of a potentially liable party (force majeure, intervention of third parties etc.) are well known to legal systems and must be included in any liability rules to be developed. These exemptions and defences ensure that parties are only held responsible for things within their control and are required for fundamental fairness and to avoid undesired consequences such as discouraging innovation.	Liability shall not be established where the damage to biodiversity is a result of: (i) Act of God/force majeure; (ii) Act of war or civil unrest; and/or (iii) Intervention by a third party

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	(d) Compliance with compulsory measures imposed by a competent national authority	A person who has complied with a compulsory order by a competent national authority cannot be held responsible for the consequences since he is compelled by law to comply with any such order.	Liability shall not attach to damage which results from conduct that occurs at the direction and/or under the mandate of any governmental authority with jurisdiction over the person and/or the relevant conduct.
	(e) Permission of an activity by means of an applicable law or a specific authorization issued to the operator;	Most legal systems (i.e., fault-based systems) provide for defences where all reasonable action has been taken to prevent damage. These include both the "permit defence," and the "state of the art" defence. These defences render the exposure to loss more predictable and are essential components for insurability. Both defences must be included in any liability rules to be developed.	For purposes of these rules, damage does not include previously identified adverse effects which result from an act by an operator which was expressly authorized by the relevant authorities in accordance with national law.
	(f) The "state-of-the-art" in relation to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out.		For purposes of these rules, liability shall not attach to activities that were not considered harmful according to the state of scientific and technical knowledge at the time they were carried out as determined by the risk assessments undertaken in conjunction with approval or authorization of the activity.
	4. Additional tiers of liability in situation where: (a) The primary liable person cannot be identified (b) The primary liable person escape liability on the basis of a defence	Ultimate responsibility for the conservation and sustainable use of biodiversity lies with States. Responsibility for any additional remediation that may be required in a given case (beyond that provided in liability rules) therefore belongs to Parties.	If liability for damage to biodiversity cannot be established because (a) no person can be identified; (b) a complete defence applies; or (c) the claim is time-barred, the Party in which the damage exists shall be responsible for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity.
	(c) A time limit has expired. (d) A financial limit has been reached;		Where liability is assigned to a person but the financial limit provided for in Rule XX has been reached, the Party in which the damage exists shall be responsible for any additional remedial action that may be necessary in accordance with its obligations under the Convention on Biological Diversity.

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	(e) Financial securities of the primary liable person are not sufficient to cover liabilities	National corporate, bankruptcy and other laws provide solutions where financial securities are insufficient in particular cases. These same rules should continue to apply to those engaged in the activities covered by these rules.	National corporate and other applicable laws concerning financial insufficiencies in the Party where the damage exists shall apply.
	(f) The provision of interim relief is required.	Interim relief, which is of a temporary nature, is available in most, if not all, legal systems but only can be invoked in clear cases in which judicial review results in a finding of imminent and irreversible danger or threats, in this case, to biodiversity.	Interim relief may be granted by a competent court only in the case of an imminent, significant and likely irreversible damage to biodiversity. The defendant's costs and losses shall be paid by the claimant in any case where interim relief is granted but liability is not established subsequently in the case.
	5. Issues for further consideration (a) Combination of fault liability and strict liability; (b) Recourse against third party by the person who is liable on the basis of strict liability; (c) Joint and several liability or apportionment of liability (d) Vicarious liability.	As noted above, strict liability is not the appropriate standard of liability with respect to biotechnology activities and therefore a combination approach is not appropriate. Recourse against others at fault, however, is a standard legal feature and necessary for fairness in any liability rules to be developed. The doctrine of joint and several liability operates only in cases of indivisible harm. Here the usual requirements for establishing fault and causation for each potentially liable person would apply.	In the case of liability of more than one person, liability shall be apportioned on the basis of relative degrees of fault.

V. LIMITATION OF LIABILITY

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
A. Issues for further consideration	(a) Limitation in time (relative time-limit and absolute time-limit);	Both relative and absolute time limits are standard features of legal systems and essential components of any liability rules to be developed. A limitations period also promotes vigilance and care by potential claimants concerning their legal rights, results in fewer evidentiary problems, provides predictability for defendants, and, overall, contributes to a well-functioning legal system. The existence of a statute of limitations also directly affects insurability. It is required in order to gain financial security from the market place, which will not provide coverage for liability for an unlimited amount of time.	Any claim for damage to biodiversity shall be brought within three years from the date the damage is known or reasonably could have been known but shall in no case be recognized if not brought within twenty years of the conduct alleged to have caused the damage occurred.
	(b) Limitation in amount including caps and possible mitigation of amount of compensation for damage under specific circumstances to be determined, and to be considered in conjunction with section VI on mechanisms of financial security.	Maximum amounts for which any person could be held liability must be part of any liability rules that may be developed. They are a standard element of liability regimes, including in international instruments. Such liability limitations (also referred to as "caps" or "ceilings") are established in order to strike the right balance between holding persons responsible for harm they may cause and avoiding that legal consequences deter persons from innovation, technological advances and other pursuits that benefit the public as a whole. Establishment of a liability cap enhances legal security and thus creates a more stable environment in which researchers, developers and users can work. A cap on liability also is essential to render a system insurable, and hence, workable.	Total costs of compensation and redress measures shall not exceed ____XXX __USD.

VI. MECHANISMS OF FINANCIAL SECURITY

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
A. Coverage of liability	Option 1 Compulsory financial security. Option 2 Voluntary financial security.	Under any liability rules to be developed, care must be taken to ensure that the requirements do not prevent or inhibit insurability. The financial responsibility of private parties engaged in businesses involving products of biotechnology is a subject of national corporate law. Most jurisdictions have governing legislation under which companies may do business that includes provisions on financial responsibility. Neither option is therefore acceptable since this matter must be left to national law.	National corporate and other applicable laws concerning financial security for the conduct of commercial and research and development activities in the Party where the damage exists shall apply.
B. Supplementary collective compensation arrangements	Option 1 Fund financed by contributions from biotechnology industry to be made in advance on the basis of criteria to be determined. Option 2 Fund financed by contributions from biotechnology industry to be made after the occurrence of the damage on the basis of criteria to be determined.	Funds have serious limitations: first, they address damage only after the event and, secondly, they do not create incentives to prevent damage. There also are significant practical problems with funds, which were discussed at length during the adoption of the EU Directive on Environmental Liability. In the end, the EU decided NOT to impose any financial security to allow the necessary flexibility for business to operate responsibly. The "polluter pays" principle requires that those who cause damage should remedy it. This does not justify an indiscriminate tax on an entire industry sector. Both Options 1 and 2 should be rejected because it does not distinguish between those who actually cause damage and those who do not and allows all responsible persons outside the "biotechnology industry" to escape liability completely no matter how egregious their acts. Both options therefore fail to implement the polluter pays principle. The first option has the added problem that it creates a significant additional and justified barrier to market entry, thus impeding beneficial biotechnology activity and the sharing of benefits, including technology transfer, as envisioned in CBD Articles 16-19.	No provision.

	Option 3 Combination of public and private funds.	Option 3 is superior to Options 1 and 2 because it acknowledges the broad range of responsible parties involved in biotechnology innovation, development and technology transfer. It also acknowledges the public role and responsibility for authorization of LMOs in furtherance of the conservation and sustainable use of biodiversity. Creating a fund that combines public and private funds does not, however, overcome the limitations and difficulties with funds in general as outlined above.	
C. Issues for further consideration	(a) Modes of financial security (insurance, insurance pool, self-insurance, bonds, state guarantees or other financial guarantees).	The financial responsibility of private parties engaged in businesses involving products of biotechnology is a subject of national corporate law. Most jurisdictions have governing legislation under which companies may do business that includes provisions on financial responsibility.	National corporate and other applicable laws concerning financial security for the conduct of commercial and research and development activities in the Party where the damage exists shall apply.
	(b) Institutional modalities for the operation of a fund.	See comments above concerning the limitations and difficulties of funds.	No provision.

VII. SETTLEMENT OF CLAIMS

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
Optional procedures	(a) Inter-State procedures (including settlement of disputes under Article 27 of the Convention on Biological Diversity);	Article 27 of the CBD is applicable to govern disputes that may arise under the Protocol, including claims of damage. It is broad enough to involve not only CBD Parties but all "parties concerned," e.g., importers, etc. See CBD Art. 27(1). The procedure entails third party mediation, arbitration and/or submission to the International Court of Justice, where necessary. See CBD Art. 27(2) and (3).	Any Party claiming damage under these rules shall seek settlement of its claim pursuant to the inter-state dispute resolution process under Article 27 of the CBD. Any Party claiming damage that is not satisfactorily resolved under the procedure set forth in Article 27 of the CBD shall submit its claim for resolution to the Permanent Court of Arbitration (PCA) subject to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Any claim for damage to biodiversity under these rules shall be cognizable by a competent court only after applicable CBD and PCA procedures have been exhausted.

	(b) Civil Procedures (i) Jurisdiction of courts or arbitral tribunals;	Existing international private law already determines where claims may be brought for cross-border disputes and the law that applies. International law also addresses enforcement of arbitral awards and judgments (e.g., United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). (See L. Bergkamp, www.croplife.org, Biosafety Protocol, Liability & Redress.)	Following exhaustion of inter-state procedures under CBD Article 27 and pursuant to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment of the Permanent Court of Arbitration, a Party may submit a claim for damage covered by these rules to a competent court as determined by international law.
	(ii) Determination of the applicable law;		Determination of applicable law shall be in accordance with international law.
	(iii) Recognition and enforcement of judgments or arbitral awards.		Recognition and enforcement of judgements or awards shall be in accordance with international law.
	(c) Administrative procedures		No provision.
	(d) Special tribunal (e.g., Permanent Court of Arbitration optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment).	Representatives of the PCA have informed the Liability Working Group that the PCA and Optional Rules are available for use in this context.	Any Party claiming damage that is not satisfactorily resolved under the procedure set forth in Article 27 of the CBD shall submit its claim for resolution to the Permanent Court of Arbitration subject to the Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Any claim for damage to biodiversity under these rules shall be cognizable by a competent court only after applicable PCA procedures have been exhausted.

VIII. STANDING/RIGHT TO BRING CLAIMS

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
A. Issues for further consideration	(a) Level of regulation (international and/or domestic level); (b) Distinction between inter-State procedures and civil procedures; (c) Level of involvement in the transboundary movement of living modified organisms as a requirement of standing/right to bring claims (d) Type of damage: (i) Traditional damage: affected person, dependents, or any other person acting on behalf or in the interest of that person; (ii) Costs of response measures: person or entity incurring the costs; (iii) Damage to environment/conservation and sustainable use of biodiversity: o Affected State o Groups acting in vindication of common interests; o Person or entity incurring the costs of restoration measures. (iv) Damage to human health: o Affected State; o Affected person or any other person entitled to act on behalf of that person; (v) Socio-economic damage: o Affected State; o Groups acting in vindication of common interests or communities.	In international and national law, legal standing to bring a claim is limited to those who suffer the actual damage. This limitation ensures that those who come to court have direct and important interests and avoids the courts being flooded with (and the public bearing the costs of) cases brought by those not directly impacted by the damage. Since protection of biodiversity is a public interest, the State, as a Party to the Protocol, has the responsibility to act and seek recovery if damage to the conservation and sustainable use of biodiversity occurs. Only Parties should be able to introduce a claim for damage under any liability rules to be developed under the Protocol.	Following exhaustion of dispute resolution and arbitration requirements (see section XX), a Party to the Cartagena Protocol on Biosafety may bring a claim for damage to biodiversity in a competent court.

IX. NON-PARTIES

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
A. Issues for further consideration	Possible special rules and procedures in the field of liability and redress in relation to LMOs imported from non-Parties (e.g. bilateral agreements requiring minimum standards).	As stated above, there is no legal jurisdiction for the establishment of any liability rules for non-Parties. Similarly there is no basis to create any special rules for bilateral and other arrangements established under Article 14 of the Protocol. Foreign persons carrying out activities in a country that is Party to the Protocol will be subject to the laws of that country, including on liability, regardless of whether their own country is Party. Great care must be taken to avoid that liability rules discourage additional countries from joining the Protocol, which will be the case if the rules are extreme and lack sound scientific and legal bases.	No provision.

X. COMPLEMENTARY CAPACITY BUILDING MEASURES

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
Possible approaches	(a) Use of measures adopted under Article 22 of the Protocol, including use of roster of experts and the Action Plan for Building Capacities for Effective Implementation of the Protocol, e.g., exchange of best practices in the design and implementation of national rules and procedures on liability and redress, e.g., establishment of baseline conditions and monitoring of changes in the baseline conditions.	The GIC continues to view national capacity building as critical since limitations in national legal systems are likely the single biggest impediment to ensuring liability and redress for any form of harm to biodiversity. Careful consideration should be given by the Working Group to ongoing efforts by UNEP to identify gaps and capacity building needs at the national level in the field of liability and redress and identification of possible tools to meet these deficiencies.	Not applicable.

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	(b) Development of specific complementary capacity building measures, based on national needs and priorities, for the design and implementation of national rules and procedures on liability and redress, e.g., establishment of baseline conditions and monitoring of changes in the baseline conditions.		Not applicable.

XI. CHOICE OF INSTRUMENT

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	Option 1 One or more legally binding instruments. (a) A liability Protocol to the Biosafety Protocol. (b) Amendment of the Biosafety Protocol. (c) Annex to the Biosafety Protocol. (d) A liability Protocol to the Convention on Biological Diversity.	See Comment to Option 6 below. If any rules are developed at the international level, they should be established in a Protocol on Liability and Redress to the CBD (option d). A general approach to liability under the CBD ensures the greatest protection of biodiversity because such rules would apply regardless of the activity involved to address all actual damage to biodiversity. CBD rules on liability would also avoid the discrimination against a single technology inherent in a Protocol-specific regime and make the most use of scarce resources.	Not applicable.
	Option 2 One or more legally binding instruments in combination with interim measures pending the development and entry into force of the instrument(s).	Article 27 of the CBD, applicable to the Protocol, provides the necessary interim measure to resolve any dispute that may arise as a result of allegations of damage to biodiversity resulting from LMOs.	Not applicable.

ELEMENT/ISSUE		COMMENT	OPERATIONAL TEXT
	Option 3 One or more non-binding instruments: (a) Guidelines (b) Model law or model contract clauses.	Both guidelines and/or model provisions (legislative and contractual) should be developed to assist countries that have not already done so to provide for liability and redress at the national level in the event of damage to biodiversity from any source.	Not applicable.
	Option 4 Two stage approach (initially to develop one or more non-binding instruments, evaluate the effects of the instrument(s) and then consider to develop one or more legally binding instruments)	A two stage approach should begin with immediate development of guidelines/model provisions and a tailored capacity building plan. The first stage also could include development of administrative and procedural rules to assist with definitional issues and use of existing law for the selection of courts, substantive law and enforcement of judgements. The second stage could consider what additional definitions, procedures, etc. may be needed to provide for liability and redress in light of existing international systems.	Not applicable.
	Option 5 Mixed approach (combination of one or more legally binding instruments, e.g., on settlement of claims, and one or more non-binding instruments, e.g. on the establishment of liability).		Not applicable.
	Option 6 No instrument.	Because the fundamental analysis (e.g. gap analysis, examination of applicability of existing laws and mechanisms, etc.) required by Article 27 has not yet been completed in any substantive way and because the biggest threats to biodiversity are well known and do not include biotechnology (see, e.g., UNEP/CBD/SBSTTA/2/3, at para. 9 and UNEP/CBD/COP/8/31, Decision VIII/9 (Millennium Ecosystem Assessment), at para. 13), the private sector users and developers of biotechnology do not believe development of a biotech-specific international liability regime is legally or scientifically justified. The private sector does support capacity building and appropriate action at the international level, including the development of non-binding instruments such as guidelines or models and possibly a legally binding instrument limited to transnational process issues not already covered by existing international instruments (e.g., UN ILC work, etc.).	Not applicable.

GREENPEACE INTERNATIONAL [29 SEPTEMBER 2006]
[SUBMISSION: ENGLISH]

Following the second meeting of the Open-ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the Context of the Cartagena Protocol on Biosafety (BSWG-L&R-2) held in Montreal from 20 to 24 February 2006.1 of the meeting invited where Parties, other Governments, relevant international organizations and stakeholders to submit further views on the matter covered by Article 27 of the Protocol, in particular with respect to approaches, options and issues identified in sections IV to XI of the working draft, contained in annex II of the report, preferably in the form of proposals for operational texts.

Greenpeace International participated as an observer in the first meeting of the Ad Hoc Working Group, as well as the the earlier meeting of the Technical Group of Experts on Liability and Redress, held in Montreal in October 2004.

Greenpeace International presents this submission by consideration by the Parties, other Governments, relevant international organizations and stakeholders. This submission complements its earlier submission to the February meeting, which was comprised of a discussion of the essential elements of a liability regime, and a suggested draft protocol, where the issues discussed are specifically addressed. The attached draft protocol takes into account discussions and suggestions made in the February meeting.

We would like to take this opportunity to note essential criteria for effective rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms. These include that:

- Absolute liability should govern;
- limitation should be unlimited in amount;
- there should a broad definition of recoverable damage and scope of application;
- there should be an appropriate scope of damage covered;
- all responsible parties should bear joint and several lliability;
- there should be a backup fund;
- there should be a just time limit of liability;
- just standing provisions and access to justice;
- just rules on burden of proof and causation;
- binding effective and affordable dispute resolution procedures;
- applicable law should be that of the claimant; and
- claimants should be able to bring claims in their own Courts or in a neutral tribunal.

We also note that the list of criteria for the assessment of the effectiveness of any rules and procedures referred to in Article 27 of the Protocol, contained in annex I to the present, is indicative, was finalized after informal consultations but not after any consultations with NGOs, and was included on the basis that it was not negotiated and is non-exhaustive.

We look forward to seeing all participants at the third meeting of the Working Group.

1 Report of the Open-Ended Ad Hoc Working Group of Legal and Technical Experts on Liability and Redress in the context of the Cartagena Protocol on Biosafety on the Work of its Second Meeting, UNEP/CBD/BS/COP-MOP/3/10, 24 February 2006, at http://www.biodiv.org/doc/notifications/2006/ntf-2006-033-lr-en.pdf.

Suggested Text for Protocol on Liability and Redress for Damage Resulting from Transboundary Movements of Living Modified Organisms to the Convention on Biological Diversity Version 2 September 2006	**Commentary** This text is provided by way of suggestion and is subject to correction and clarification as necessary. Amendments made following 2nd meeting of Ad Hoc Working Group February 2006.
1. The Parties to this Protocol,	
Being Parties to the Convention on Biological Diversity, hereinafter referred to as "the Convention", Being Parties to the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, hereinafter referred to as the "Cartagena Protocol", Mindful of their obligations under the Convention and the Cartagena Protocol, Recalling Article 27 of the Cartagena Protocol, which required the Conference of the Parties serving as the meeting of the Parties to the Protocol to, at its first meeting, adopt a process with respect to the appropriate elaboration of international rules and procedures in the field of liability and redress for damage resulting from transboundary movements of living modified organisms, analyzing and taking due account of the ongoing processes in international law on these matters, and to endeavour to complete this process within four years, Recalling also article 14 of the Convention, which required the Conference of the Parties to examine, on the basis of studies to be carried out, the issue of liability and redress, including restoration and compensation, for damage to biological diversity, except where such liability is a purely internal matter, Aware of the rapid expansion of modern biotechnology and the growing public concern over liability for any adverse effects on biological diversity, taking also into account liability for adverse effects on human health, Recognizing also the potential adverse effects which may be caused by modern biotechnology to centres of origin and centres of genetic diversity, Taking into account the vulnerability of many countries, particularly developing countries, to risks associated with living modified organisms, Desirous of ensuring adequate, equitable and prompt compensation for persons who suffer injury or damage and ensuring adequate and prompt reparation to the environment for damage caused by living modified organisms, Reaffirming the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development and Principle 16 of the Rio Declaration that the polluter should, in principle, bear the cost of pollution, Convinced of the need for unifying the rules applying in the various countries to the liability incurred for such damage, whilst leaving these countries free to take, on a national basis, any additional measures which they deem appropriate, Have agreed as follows:	

PART I INTRODUCTION **ARTICLE 1** **OBJECTIVE** The Objective of this Protocol is to provide for a comprehensive regime for liability and redress to ensure adequate, equitable and prompt compensation for damage and to ensure adequate and prompt reparation to the environment for damage consequent upon the transboundary movement of living modified organisms.	
ARTICLE 2. **USE OF TERMS** For the purposes of this Protocol:	
1. Terms defined in the Cartagena Protocol shall have the meaning defined in that Protocol; 2. 'Area under national jurisdiction' shall mean the territory of a Contracting Party and any other areas over which the Contracting Party has sovereignty o jurisdiction according to international law.1 3. 'Compensation' shall include compensation for damage, restoration and remediation and other amounts payable under this Protocol. 4. 'Damage' includes (i) Damage to human health including: (a) Loss of life or personal injury or disease together with medical costs including costs of diagnosis and treatment and associated costs ; (b) Impairment of health; (c) Loss of income;	It is important clearly to define the area of application of the Protocol. Under the Law of the Sea Convention 1982, the Coastal State has jurisdiction with regard to the protection and preservation of the marine environment (Art. 56(1)(iii)). It must be clear that compensation includes restoration and remediation. The definition of 'damage' must be broad enough to cover any kind of damage that can be caused by LMOs. For definition of damage, reference can be made to the Lugano Convention

1 ARTICLE 56 of the Law of the Sea Convention provides as follows:

"**Rights, Jurisdiction and Duties of the Coastal State in the Exclusive Economic Zone**

1. In the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the sea-bed and of the sea-bed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;

(b) jurisdiction as provided for in the relevant provisions of this Convention with regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

(c) other rights and duties provided for in this Convention.

2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.

3. The rights set out in this article with respect to the sea-bed and subsoil shall be exercised in accordance with Part VI."

(d) Public health measures; (ii) damage to or impaired use of or loss of property; (iii) loss of income derived from an economic interest in any use of the environment, incurred as result of impairment of the environment; (iv) Loss of income, loss of or damage to cultural, social and spiritual values, loss of or reduction of food security, damage to agricultural biodiversity, loss of competitiveness or other economic loss or other loss or damage to indigenous or local communities. (v) damage to the environment, including (a) the costs of reasonable measures of reinstatement or remediation of the impaired environment, where possible, measured by the costs of measures actually taken or to be undertaken, including introduction of original components; 2 (b) where reinstatement or remediation to the original state is not possible, the value of the impairment of the environment, taking into account any impact on the environment, and the introduction of equivalent components at the same location, for the same use, or on another location for other types of use, and (c) the costs of response measures, including any loss or damage caused by such measures; and (d) the costs of preventive measures, including any loss or damage caused by such measures;3 (e) the costs of any interim measures; and (f) any other damage to or impairment of the environment, taking into account any impact on the environment; Provided that the damage was caused directly or indirectly by living modified organisms during or following a transboundary movement of the living modified organisms, or in the case of preventive measures, is threatened to be so caused.4 5. 'Effect' includes (a) any direct or indirect effect, (b) any temporary or permanent effect, (c) any chronic or acute effect, (d) any past, present, or future effect; and (e) any cumulative effect which arises over time or in combination with other effects.5	Consistently with the polluter pays principle, damage must include reinstatement, remediation, impairment, and preventive measure, as well as damage to private property, economic losses and injury or disease. It needs to be clear that socio-economic damage to local and indigenous communities is covered, following article 24 of the Protocol.

2 Similar to Vienna Convention as amended 1997 article 1(k)

3 Vienna Convention as amended 1997 article 1(k)

4 Wording from Lugano Convention

5 Definition from New Zealand Resource Management Act 1991.

6 See Lugano Convention

7 There is no definition of 'farmer' in e.g. International Treaty on Plant Genetic Resources for Food and Agriculture, at ftp://ext-ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf. The definition of farmer allows a farmer to sell 50% of the farmer's product in any year.

8 Based on art 2 of the Basel Liability Protocol and Lugano Convention

9 Based on art 2 of the Basel Liability Protocol

10 Based on art 2 of the Basel Liability Protocol

6. 'Environment' includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii) biodiversity, (iv) amenity values, (v) indigenous or cultural heritage,6 and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition. 7. 'Environment' includes all natural resources, including (i) air, water, soil, fauna and flora, and the interaction between the same factors, (ii) ecosystems and their constituent parts, (iii) biodiversity, (iv) amenity values, (v) indigenous or cultural heritage, and (vi) social, economic, aesthetic, and cultural conditions which are affected by the matters stated in paragraphs (i) to (v) of this definition. 8. 'Farmer' means7 mean a person growing a crop or other product for the individual's use or for purposes of sale of the crop or other product grown from the living modified organism. A person shall not be considered a farmer if that person produces and sells or otherwise transfers seeds of living modified organisms or plant parts containing heritable material including living modified organisms, if such products constitute over 50% of the total product of the living modified organism sold or transferred by that person in any 365 day period. 9. 'Impaired" in relation to the environment' shall include any adverse effects on the environment.the environment. 10. 'Measures of reinstatement' means any reasonable measures aiming to assess, reinstate or restore damaged or destroyed components of the environment.8 11. 'Notifier' means the person who notifies the competent national authority of the Party of import prior to the intentional transboundary movement of a living modified organism that falls within the scope of Article 7, paragraph 1 of the Cartagena Protocol. 12. 'Occurrence' means any occurrence or incident, or series of occurrences or incidents having the same origin, that causes damage or creates a serious threat of damage; and includes any act, omission, event or circumstance, foreseen or unforeseen, resulting from or following any transboundary movement of any living modified organism.9 13. 'Person' includes natural and legal persons. 14. 'Preventive measures' means any reasonable measures taken by any person in response to an occurrence, to prevent, minimize, or mitigate loss or damage, or to address damage or threatened damage to biodiversity, or to effect environmental clean-up.10 15. 'Territory' means the territory of a Contracting Party, the internal and territorial waters and the airspace over the territory. 16. A 'Transboundary Movement' commences either (a) when a living modified organism is prepared for export within the territory of a State by the preparation, handling, or packaging of the living modified organism for export by transport; or (b) in any other case, when an LMO leaves the territory of the State.	

ARTICLE 3. **SCOPE OF APPLICATION** 1. (a) This Protocol shall apply to damage resulting from the transport, transit, handling and/or use of living modified organisms resulting from transboundary movements of living modified organisms, including unintentional and illegal transboundary movements of living modified organisms, (b) This Protocol shall apply to any damage described by paragraph (a) wherever suffered including in areas (i) within limits of national jurisdiction or control of Contracting Parties; (ii) within the limits of national jurisdiction or control of non-Contracting Parties; or (iii) beyond the limits of national jurisdiction or control of States.11 2. Whenever a transboundary movement is effected by transport: (a) When the State of export is a Contracting Party to this Protocol this Protocol shall apply with respect to damage arising from an occurrence which takes place from the point where the living modified organisms are loaded on the means of transport in an area under the national jurisdiction of the State of export. (b) When the State of import, but not the State of export, is a Contracting Party to this Protocol, this Protocol shall apply with respect to damage arising from an occurrence which takes place after the time at which the importer has taken ownership or possession of the living modified organism. 3. In any other case, this Protocol shall apply when there is a movement of a Living Modified Organism from within an area under national jurisdiction of a Contracting Party. 4. Nothing in the Protocol shall affect in any way the sovereignty of States over their territorial seas and their jurisdiction and the right in their respective exclusive economic zones and continental shelves in accordance with international law. 5. Unless a different intention appears from this Protocol, or is otherwise established, the provisions of this Protocol do not bind a Contracting Party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that Contracting Party.12	It is essential that damage stemming from transboundary movements of LMOs is covered, whether it occurs at the transit, handling or use stage. All such damage stems from the transboundary movement. The Protocol must cover property damage, economic damage, damage to biodiversity, preventive measures, the cost of reinstatement and reinstatement or remediation of an impaired environment. The scope should also cover damage to areas beyond national jurisdiction such as the high seas. Art 3(1) Wording taken from Vienna Convention as modifie d in 1997, Article 1A. Art 3(3) wording to clarify applicability in case of no transport. Art 4(4) is from Basel Liability Protocol Art 3(4).

11 Wherever suffered from Vienna Convention art. 1A

12 Article 28 Vienna Convention on the Law of Treaties

PART II LIABILITY **ARTICLE 4.** **ABSOLUTE LIABILITY** 1. The exporter and notifier of any living modified organism shall be liable for all damage caused by the living modified organism from the time of export of the living modified organism. 2. Without prejudice to paragraph 1, the importer of the living modified organism shall be liable for all damage caused by the living modified organism from the time of import. 3. Without prejudice to paragraphs 1 and 2, should the living modified organism be re-exported from the state of import, the second and subsequent exporter and notifier of the living modified organism shall be liable for all damage caused by the living modified organism from the time of re-export of the living modified organism and the second and subsequent importer shall be liable for all damage caused by the living modified organism from the time of import. 4. Without prejudice to the preceding paragraphs, from the time of import of the living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the imported living modified organism shall be liable for all damage caused by the living modified organism. Such persons shall include any distributor, carrier, and grower of the living modified organism and any person carrying out the production, culturing, handling, storage, use, destruction, disposal, or release of the living modified organism, with the exception of a farmer. 5. In the case of unintentional or illegal transboundary movement of a living modified organism, any person intentionally having ownership or possession or otherwise exercising control over the living modified organism immediately prior to or during the movement shall be liable for all damage caused by the living modified organism. 6. Any exporter, notifier and any person having ownership or possession or otherwise exercising control shall be liable for during the case of transit of living modified organisms through States other than the Party of export or Party of import. 7. All liability under this article shall be joint and several. If two or more persons are liable according to this article, the claimant shall have the right to seek full compensation for the damage from any or all of the persons liable. 8. If an occurrence consists of a continuous occurrence, all persons successively exercising the control of the living modified organism immediately before or during that occurrence shall be jointly and severally liable. 9. In the case of a person liable under this article being financially unable fully to meet the compensation for damages, together with costs and interest, as provided in this Protocol, or otherwise fails to meet such compensation, the liability shall be met by the State of which the person is a national.	Any defence such as force majeure or Act of God shifts the risk to the victim, or to society or the environment. To allow exoneration from liability in the case of force majeure or Act of God shifts liability from the producer to the damaged farmer and/or public and amounts to a de facto subsidy to the LMO industry. In other words, in case of a natural exceptional phenomenon, the producer would escape liability but the GE-free farmer, or the public, would still suffer the damage, and receive no compensation. Liability should therefore be absolute. LMO exporters and importers have the choice of undertaking the activity and should pay for damage regardless of cause. The relevance and importance of the precautionary principle is also important in the context of the shifting the burden of proof of damage to those introducing LMOs, and to proving causation. The polluter pays principle means that all persons responsible for damage must pay (joint and several liability) so if one cannot or does not pay, the others responsible must pay, to ensure compensation is paid. Liability should be channeled to all parties responsible for export, import and distribution (and related activities) of the LMO, except the farmer, as an end user of a LMO.

ARTICLE 5. **FAULT-BASED LIABILITY** Without prejudice to article 4, any person shall be liable for damage caused or contributed to by that person's lack of compliance with the provisions implementing the Convention or the Protocol or by that person's wrongful intentional, reckless or negligent acts or omissions.	Breach of the Convention or Protocol or fault should give rise to liability.
ARTICLE 6. **PREVENTIVE MEASURES REQUIRED** Subject to any requirement of domestic law, any person in operational control of living modified organisms at the time of an occurrence shall take all reasonable measures to mitigate damage arising therefrom.	An overarching obligation to mitigate damage is essential.
ARTICLE 7. **RIGHT OF RECOURSE** 1. Any person liable under the Protocol shall be entitled to a right of recourse in accordance with the rules of procedure of the competent court: (a) against any other person also liable under the Protocol; and (b) as expressly provided for in contractual arrangements. 2. Nothing in the Protocol shall prejudice any rights of recourse to which the person liable might be entitled pursuant to the law of the competent court.	This article allows cross-claims and claims for contributions where multiple persons may be liable.
ARTICLE 8. **JURISDICTION AND APPLICABLE LAW** 1. Primary jurisdiction over actions under this Protocol shall lie with the courts of the Contracting Party where the damage occurs. 2. If the damage occurs only beyond the limits of national jurisdiction, primary jurisdiction over actions under this Protocol shall lie with the courts of the State of import or the intended State of import, or, if the transboundary movement was unintended, with the courts of the State most closely connected with the damage. 3. Jurisdiction over actions under this Protocol shall also lie with the courts of the Contracting Party where the occurrence took place, where the defendant has his habitual residence or has his principal place of business.13 4. All matters of substance or procedure regarding claims before the competent court which are not	This article allocates jurisdiction, firstly to where the damage occurred, and if the damage occurred e.g. in the high seas, to the State most closely connected with the damage. Jurisdiction where the defendant is resident may be necessary to ensure recovery of damages.

13 Basel Protocol art 17

specifically regulated in this Protocol shall be governed by procedural and substantive law of that court.14 The nature, form and extent of the compensation, as well as the equitable distribution thereof, shall be governed by that law, and shall be consistent with this Protocol. 5. Each Contracting Party shall (a) ensure that its courts possess the necessary competence to entertain claims for compensation under this Protocol and (b) shall adopt the legislative measures necessary to ensure that the laws provide for compensation according to this Protocol and according to any harmonizing recommendations made by the Assembly under article 15.	
ARTICLE 9. **COURT POWERS AND PROCEDURES** 1. Courts shall have the power to order remediation and restoration as well as compensation and may order costs and interest. 2. The Court shall presume that (a) the living modified organism which was the subject of a transboundary movement caused the damage where there is a reasonable possibility that it could have done so and (b) that any damage caused by a living modified organism which was the subject of a transboundary movement is the result of its biotechnology-induced characteristics rather than any natural characteristics.15 To rebut the presumption a person must prove to the standard required by the procedural law applied pursuant to article 8 that the damage is not due to the characteristics of the living modified organism resulting from the genetic modification, or in combination with other hazardous characteristics of the living modified organism. 3. When considering evidence of the causal link between the occurrence and the damage, the court shall take due account of the increased danger of causing such damage inherent in undertaking the transboundary movement of or exercising ownership, possession or control over the living modified organism.16 4. Orders for compensation for damage shall fully compensate affected persons and shall pay the cost of preventive measures and costs of reinstatement or remediation of the environment. 5. The Court shall have the power to order interim or preliminary measures to order any person to take or abstain from any act where necessary or desirable to prevent significant damage, to mitigate or avoid further damage. 6. The principle of wide access to justice17 shall be implemented. To this end, persons and groups with a concern for or interest in environmental, social or economic matters, persons and groups representing	Damage may be caused to the environment and society without necessarily damaging private property interests as such. Also damage may be caused to areas such as the high seas. So groups acting in the general interest, for groups such as farmer or consumer interests and for the environment, must have standing to sue. Also, other barriers to justice, such as, security for costs, liability for costs of the winning party and lack of legal aid must not prevent access to justice. A presumption is necessary since it may be difficult or impossible to prove that damage was caused by a particular LMO. The exporter, distributor etc is in a better position to discharge a burden of proof than the victim. The other procedural measures are aimed at upholding the principle of wide access to justice and wide powers of the Court to address damage. Standing should not be restricted to legal interest.

14 Basel Protocol art 19

15 Cf. Austrian law on genetic engineering. UNEP/CBD/ICCP/3/3, para. 27.

16 from Lugano Convention

communities or business interests and local, regional and national governmental authorities, shall have standing to bring a claim under this Protocol. 7. Nothing in the Protocol shall be construed as limiting or derogating from any rights of persons who have suffered damage, or as limiting the protection or reinstatement of the environment which may be provided under domestic law.18 8. Financial and other barriers to justice shall not impede access to justice under this article and Contracting Parties shall take appropriate steps to remove or reduce such barriers.19	
ARTICLE 10. **LIS PENDENS** 1. Where proceedings involving the same or similar cause of action and between the same or substantially the same parties are brought in the courts of another Contracting Party or Parties, any court other than the court described in paragraphs 1 and 2 of article 8 shall of its own motion stay its proceedings unless and until the court described in paragraphs 1 and 2 article 8 rules that it does not have jurisdiction under this Protocol. 2. Where the jurisdiction of the court described in paragraphs 1 and 2 is established by that court, any court other than that court shall decline jurisdiction in favour of that court. 3. When there are two or more courts described in paragraphs 1 and 2 of article 8, then any court other than the court described in paragraphs 1 and 2 of article 8 and first seized of the case shall of its own motion stay its proceedings unless and until the court first seized of the case rules that it does not have jurisdiction under this Protocol. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court shall decline jurisdiction in favour of that court.20	These provisions are drawn mainly from the Lugano Convention, and are addressed at resolving scenarios where claims are brought in different countries about the same or similar matters.
ARTICLE 11. **RELATED ACTIONS** 1. Where related actions are brought in the different courts described in article 8, any court other than the court described in paragraphs 1 and 2 of article 8 shall, while the actions are pending at first instance, stay its proceedings upon the motion of a party to any of the proceedings.	These provisions are taken mainly from the Lugano Convention, and are addressed at closely connected cases that should be heard in the same proceedings.

17 Cf Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark, 25 June 1998.

18 from Basel Liability Protocol art 20

19 Cf Aarhus Convention article 9(5)

20 This may arise for instance with damage caused in two states or principally beyond national jurisdiction

2. A court other than the court described in paragraphs 1 and 2 of article 8 shall, on the application of one of the parties, decline jurisdiction if the law of that court the court described in paragraphs 1 and 2 of article 8 permits the consolidation of related actions and the court first seized has jurisdiction over both or all actions. 3. When related actions are brought in the courts of different Parties, and all courts are described in article 8, then any court other than the court first seized of the case may of its own motion stay its proceedings until the court first seized of the case rules whether it has jurisdiction under this Protocol. Where the jurisdiction of the court first seized of the case is established by that court, any court other than that court may decline jurisdiction in favour of that court. 4. For the purposes of this article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.	
ARTICLE 12. **ENFORCEMENT** 1. Judgments entered by the competent court under article 8 after trial, or by default or by consent, shall, when they have become enforceable under the law applied by that court, become enforceable in the territory of any of the other Contracting Parties as soon as the formalities required by the Contracting Party concerned have been complied with. The merits of the case shall not be the subject of further proceedings. The foregoing provisions shall not apply to interim judgments. 2. The foregoing provisions shall not apply if (a) a decision was given in default of appearance and the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time to enable him to arrange for his defence, or (b) the judgment was obtained by fraud.21 3. If an action is brought against a Contracting Party under this Convention, such Contracting Party may not, except in respect of measures of execution, invoke any jurisdictional immunities before the court competent in accordance with this article.	These provisions broadly follow the Basel Liability Protocol provisions on the enforcement of judgments. No public policy exception should be permitted, since such an exception may interfere with fair application of this protocol.
ARTICLE 13. **IMPLEMENTATION** 1. Contracting Parties shall adopt the legislative, regulatory and administrative measures necessary to implement this Protocol. 2. In order to promote transparency, Contracting Parties shall inform the Secretariat of measures to	This article aims to ensure broad implementation of the Protocol.

21 Broadly following Basel Liability protocol art 21

implement thus Protocol, 3. The provisions of this Protocol shall be applied without discrimination based on nationality, domicile or residence.	
ARTICLE 14. **TIME LIMITATION OF LIABILITY** 1. Claims for compensation under this Protocol shall not be admissible unless they are brought within ten years from (a) the date of the occurrence of the damage, or (b) from the date the damage becomes known or reasonably should have become known by the claimant and is known by the claimant to be attributable to the occurrence or should reasonably have been known to be so by the claimant, whichever occurs later. 2. Where the occurrence consists of a series of occurrence having the same origin, the date of occurrence under this article shall be the date of the last of such occurrence. Where the occurrence consists of continuous occurrence, such time limit shall run from the end of that continuous occurrence.	It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 22). The time must run from the date of the occurrence of the damage or the date of discovery of the occurrence of the damage, since the damage may take time to manifest itself.
PART III INSTITUTIONAL **ARTICLE 15.** **CONFERENCE OF THE PARTIES SERVING AS THE MEETING OF THE PARTIES TO THIS PROTOCOL** 1. The Conference of the Parties shall serve as the meeting of the Parties to this Protocol. 2. The provisions of article 29 of the Cartagena Protocol shall apply, <u>mutatis mutandis</u>, to this Protocol. 3. The Conference shall, *inter alia,* (a) Consider and adopt, as required, amendments to this Protocol and its annexes, as well as any additional annexes to this Protocol, that are deemed necessary for the implementation of this Protocol; (b) Pass and amend regulations with respect to this Protocol; (c) Make recommendations for Contracting Parties to achieve harmonization of national laws to facilitate the achievement of the objectives of this Protocol; (d) Exercise such other functions as may be required for the implementation of this Protocol. 4. The rules of procedure of the Conference of the Parties and financial rules of the Convention shall be applied, <u>mutatis mutandis</u>, under this Protocol, except as may be otherwise decided by consensus by the Conference of the Parties serving as the meeting of the Parties to this Protocol.	These articles establish institutional arrangements.
ARTICLE 16. **SECRETARIAT** 1. The Secretariat established by article 24 of the Convention shall serve as the secretariat to this	

Protocol. 2. Article 24, paragraph 1, of the Convention on the functions of the Secretariat shall apply, mutatis mutandis, to this Protocol. 3. To the extent that they are distinct, the costs of the secretariat services for this Protocol shall be met by the Parties hereto. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first meeting, decide on the necessary budgetary arrangements to this end.	
ARTICLE 17. **BIOSAFETY LIABILITY AND COMPENSATION AUTHORITY** 1. A Biosafety Liability and Compensation Authority is hereby established. The Authority shall be open to participation by all Parties. It shall report regularly to the Conference of the Parties serving as the meeting of the Parties to this Protocol on all aspects of its work. 2. Its functions shall be: (a) To perform functions assigned to it by this Protocol (b) To perform such other functions as may be determined by the Conference of the Parties.	This article establishes a Biosafety Liability and Compensation Authority, which may provide administrative, capacity-building and other functions assigned to it by the Conference of the Parties.
ARTICLE 18. **INSURANCE AND OTHER FINANCIAL GUARANTEES** 1. Exporters, notifiers, importers, distributors, growers, carriers, and other persons liable under article 4 shall establish and maintain during the period of the time limit of liability, insurance, bonds or other financial guarantees covering their liability under article 4 of this Protocol for amounts not less than the minimum limits specified in paragraph [] of Annex I according to the terms and conditions established by the Regulations passed by the Conference of the Parties serving as the meeting of the Parties to this Protocol. 2. A document reflecting the coverage of the liability of the exporter and the notifier under article 4 paragraph 1, of this Protocol or of the importer under article 4, paragraph 2, of this Protocol shall accompany the notification referred to in article 8 or Annex II of the Cartagena Protocol. Proof of coverage of the liability of the exporter and the notifier shall be delivered to the competent national authorities of the State of import. 3. Any claim under this Protocol may be asserted directly against any person providing insurance, bonds or other financial guarantees. The insurer or the person providing the financial guarantee shall have the right to require the person liable under article 4 to be joined in the proceedings.	This article ensures that persons who are liable for damage carry financial guarantees to ensure damages can be recovered from them.

PART IV THE FUND	A fund is essential, to ensure that where a liable party is insolvent or for some other reason does not pay, that damage is not left uncompensated or unremedied. A fund would also cover major disasters or accidents or situations where no party is found liable for any reason.
ARTICLE 19. **FUND ESTABLISHED** 1. An International Fund for compensation for damage, to be named "The International Living Modified Organism Compensation Fund" and hereinafter referred to as "The Fund", is hereby established with the following aims: (a) to provide compensation for and prevention, remediation or reinstatement of damage to the extent that the protection afforded by this Protocol is inadequate; (b) to provide legal aid to claimants; (b) to give effect to the related purposes set out in this Convention. 2. The Fund shall in each Contracting Party be recognized as a legal person capable under the laws of that State of assuming rights and obligations and of being a party in legal proceedings before the courts of that State. Each Contracting Party shall recognize the Director of the Fund (hereinafter referred to as "The Director") as the legal representative of the Fund.	While capacity building is important, in the context of Article 27, so is access to justice, which in practical terms may mean developing States having the capacity to lodge and pursue claims in exporting States and otherwise providing legal aid to victims. Much language for the Fund is taken from the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1971.
ARTICLE 20. **APPLICABILITY OF FUND** This Part shall apply with regard to compensation according to article 21 to damage caused in areas under the national jurisdiction of a Contracting Party or in areas beyond the limits of national jurisdiction, and to preventive measures taken to prevent or minimize such damage or for reinstatement or remediation of the environment following such damage.	This article ensures wide applicability of the Fund.
ARTICLE 21. **PAYMENT OF COMPENSATION AND REMEDIATION** 1. The Fund shall pay compensation to any person suffering damage if such person has been unable to obtain full and adequate compensation for the damage under this Protocol, either (a) because no liability for the damage arises under this Protocol; (b) because the party liable for the damage under this Protocol is financially incapable of meeting his obligations in full and any financial security that may be provided under this Protocol does not cover or is insufficient to satisfy the claims for compensation for the damage; a person being treated as financially incapable of meeting that person's obligations and a financial security being treated as insufficient if the	This article provides the mechanism for the payment of compensation and remediation. A maximum is necessary since the Fund's resources will be limited, and since the Fund has no control over activities of exporters, importers and other parties.

person suffering the damage has been unable to obtain full satisfaction of the amount of compensation due under this Protocol after having taken all reasonable steps to pursue the legal remedies available to him; 2. The Fund shall pay the costs of prevention, remediation or reinstatement of the environment where payment for such remediation or reinstatement was not available under this Protocol. 3. The aggregate amount of compensation and prevention, remediation and reinstatement payable by the Fund under this article shall in respect of any one occurrence be limited, so that the total sum of that amount and the amount of compensation actually paid under this Protocol for an occurrence, shall not exceed the amount specified in Annex IV. 4. Where the amount of established claims against the Fund exceeds the aggregate amount of compensation payable under paragraph 4, the amount available shall be distributed in such a manner that the proportion between any established claim and the amount of compensation actually recovered by the claimant under this Protocol shall be the same for all claimants. 5. The Assembly of the Fund (hereinafter referred to as "the Assembly") may, having regard to the experience of incidents which have occurred and in particular the amount of damage resulting therefrom and to changes in the monetary values, decide that the amount referred to in paragraph 2, shall be increased; provided, however, that this amount shall in no case be decreased. The changed amount shall apply to incidents which occur after the date of the decision effecting the change. 6. The Fund shall, at the request of a Contracting Party, use its good offices as necessary to assist that State to secure promptly such personnel, material and services as are necessary to enable the State to take measures to prevent or damage arising from an occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol. 7. The Fund may on conditions to be laid down in Regulations provide credit facilities with a view to the taking of preventive measures against damage arising from a particular occurrence in respect of which the Fund may be called upon to pay compensation under this Protocol.	
ARTICLE 22. **TIME LIMITATIONS** Rights to compensation under article 21 shall be extinguished unless an action is brought thereunder or a notification has been made pursuant to Article 23, paragraph 6, within ten years from the date when the damage occurred or from when the damage is discovered.	It may take time to discover damage. The limitation period should run from when the damage is found, not when it was caused, and should be sufficiently long to allow a reasonable time for a claim to be brought (see article 14)

ARTICLE 23. **JURISDICTION** 1. Subject to the subsequent provisions of this article, any action against the Fund for compensation under article 21 of this Protocol shall be brought only before a court competent under article 8 of this Protocol in respect of actions against a person who is or who would be been liable for damage caused by the relevant occurrence. 2. Each Contracting Party shall ensure that its courts possess the necessary jurisdiction to entertain such actions against the Fund as are referred to in paragraph 1. 3. Where an action for compensation for damage has been brought before a court competent under article 8 of this Protocol, such court shall have exclusive jurisdictional competence over any action against the Fund for compensation under the provisions of article 21 of this Convention in respect of the same damage. 4. Each Contracting State shall ensure that the Fund shall have the right to intervene as a party to any legal proceedings before a competent court of that State against a person who may be liable under article 4 of this Protocol. 5. Except as otherwise provided in paragraph 6, the Fund shall not be bound by any judgment or decision in proceedings to which it has not been a party or by any settlement to which it is not a party. 6. Without prejudice to the provisions of paragraph 4, where an action under this Protocol for compensation for damage has been brought before a competent court in a Contracting State, each party to the proceedings shall be entitled under the national law of that State to notify the Fund of the proceedings. Where such notification has been made in accordance with the formalities required by the law of the court seized and in such time and in such a manner that the Fund has in fact been in a position effectively to intervene as a party to the proceedings, any judgment rendered by the court in such proceedings shall, after it has become final and enforceable in the State where the judgment was given, become binding upon the Fund in the sense that the facts and findings in that judgment may not be disputed by the Fund even if the Fund has not actually intervened in the proceedings.	These provisions establish jurisdiction over actions for compensation against the Fund.
ARTICLE 24. **ENFORCEMENT** Subject to any decision concerning the distribution referred to in article 21, paragraph 4, any judgment given against the Fund by a court having jurisdiction in accordance with article 23, paragraphs 1 and 3, shall, when it has become enforceable in the State of origin and is in that State no longer subject to ordinary forms of review, be recognized and enforceable in each Contracting State on the same conditions as are prescribed in article 12 of this Protocol.	This article provides for enforcement of judgments against the Fund.

ARTICLE 25. **SUBROGATION** 1. The Fund shall, in respect of any amount of compensation for damage paid by the Fund in accordance with article 21, paragraph 1, of this Protocol, acquire by subrogation the rights that the person so compensated may enjoy under the Protocol against any person who may be liable under article 4 of this Protocol. 2. Nothing in this Convention shall prejudice any right of recourse or subrogation of the Fund against persons other than those referred to in the preceding paragraph. In any event the right of the Fund to subrogation against such person shall not be less favourable than that of an insurer of the person to whom compensation or indemnification has been paid. 3. Without prejudice to any other rights of subrogation or recourse against the Fund which may exist, a Contracting Party or agency thereof which has paid compensation for damage in accordance with provisions of national law shall acquire by subrogation the rights which the person so compensated would have enjoyed under this Protocol.	This article ensures the Fund can recover damages against those responsible.
ARTICLE 26. **ASSESSMENT OF CONTRIBUTIONS** 1. Contributions to the fund shall be made in respect of each Contracting Party by any person who, in the calendar year referred to in article 27, paragraph 1, as regards initial contributions and in article 28, paragraphs 2 (a) or (b), as regards annual contributions, has exported living modified organisms in total quantities exceeding the amount specified in Annex II. 2. For the purposes of paragraph 1, where the value of living modified organisms exported by any person in a calendar year when aggregated with the value of living modified organisms by any associated person or persons exceeds the amount specified in Annex II, such person shall pay contributions in respect of the actual quantity received by him notwithstanding that that value did not exceed the amount specified in Annex II. 3. "Associated person" means any subsidiary or commonly controlled entity. The question whether a person comes within this definition shall be determined by the national law of the Party concerned.	This article makes provision for contributions to the Fund.
ARTICLE 27. **QUANTUM OF CONTRIBUTIONS** 1. In respect of each Contracting Party initial contributions shall be made of an amount which shall for each person referred to in article 26 be calculated on the basis of a fixed sum proportionate to the value of the living modified organisms exported during the calendar year preceding that in which this Convention entered into force for that State. 2. The sum referred to in paragraph 1 shall be determined by the Assembly within three months after the entry into force of this Protocol. In performing this function the Assembly shall, to the extent possible, fix the sum in such a way that the total amount of initial contributions would, if contributions were to be made in respect	This article sets contributions to the fund according to exports of LMOs.

of 90 per cent of the quantities of living modified organisms exported throughout the world, equal ____ million SDR. 3. The initial contributions shall in respect of each Contracting Party be paid within three months following the date at which the Protocol entered into force for that Party.	
ARTICLE 28. **BUDGET** 1. With a view to assessing for each person referred to in article 26 the amount of annual contributions due, if any, and taking account of the necessity to maintain sufficient liquid funds, the Assembly shall for each calendar year make an estimate in the form of a budget of: **(i) Expenditure** (a) costs and expenses of the administration of the Fund in the relevant year and any deficit from operations in preceding years; (b) payments to be made by the Fund in the relevant year for the satisfaction of claims against the Fund due under article 21, including repayment on loans previously taken by the Fund for the satisfaction of such claims, to the extent that the aggregate amount of such claims in respect of any one incident does not exceed the amount specified in Annex I; **(ii) Income** (a) surplus funds from operations in preceding years, including any interest; (b) initial contributions to be paid in the course of the year; (c) annual contributions, if required to balance the budget; (d) any other income. 2. For each person referred to in article 26 the amount of his annual contribution shall be determined by the Assembly and shall be calculated in respect of each Contracting Party. 3. The sums referred to in paragraph 2 above shall be arrived at by dividing the relevant total amount of contributions required by the total amount of living modified organisms exported by all Contracting States in the relevant year. 4. The Assembly shall decide the portion of the annual contribution which shall be immediately paid in cash and decide on the date of payment. The remaining part of each annual contribution shall be paid upon notification by the Director. 5. The Director may, in cases and in accordance with conditions to be laid down in the Regulations of the Fund, require a contributor to provide financial security for the sums due from him. 6. Any demand for payments made under paragraph 4 shall be called rateably from all individual contributors.	This article sets a Budget for Fund and sets allocations of contributions

ARTICLE 29. **ASSESSMENT OF CONTRIBUTIONS** 1. The amount of any contribution due under article 28 and which is in arrear shall bear interest at a rate which shall be determined by the Assembly for each calendar year provided that different rates may be fixed for different circumstances. 2. Each Contracting Party shall ensure that any obligation to contribute to the Fund arising under this Protocol in respect of living modified organisms exported from the territory of that State is fulfilled and shall take any appropriate measures under its law, including the imposing of such sanctions as it may deem necessary, with a view to the effective execution of any such obligation; provided, however, that such measures shall only be directed against those persons who are under an obligation to contribute to the Fund. 3. Where a person who is liable in accordance with the provisions of articles 27 and 28 to make contributions to the Fund does not fulfil his obligations in respect of any such contribution or any part thereof and is in arrear for a period exceeding three months, the Director shall take all appropriate action against such person on behalf of the Fund with a view to the recovery of the amount due. However, where the defaulting contributor is manifestly insolvent or the circumstances otherwise so warrant, the Assembly may, upon recommendation of the Director, decide that no action shall be taken or continued against the contributor.	This article sets mechanisms for the collection of assessed contributions and enforcement action.
ARTICLE 30. **FUND BODIES** 1. The Fund shall have an Assembly, a Secretariat headed by a Director and an Executive Committee. 2. The Assembly shall consist of all Contracting States to this Protocol.	This article establishes the institution of the Fund.
ARTICLE 31 **ASSEMBLY FUNCTIONS** The functions of the Assembly shall be: 1. to elect at each regular session its Chair and two Vice-Chairmen who shall hold office until the next regular session; 2. to determine its own rules of procedure, subject to the provisions of this Protocol; 3. to adopt Internal Regulations necessary for the proper functioning of the Fund;	This article establishes the functions of the Assembly.

4. to appoint the Director and make provisions for the appointment of such other personnel as may be necessary and determine the terms and conditions of service of the Director and other personnel; 5. to adopt the annual budget and fix the annual contributions; 6. to appoint auditors and approve the accounts of the Fund; 7. to approve settlements of claims against the Fund, to take decisions in respect of the distribution among claimants of the available amount of compensation in accordance with article 21, paragraph 3, and to determine the terms and conditions according to which provisional payments in respect of claims shall be made with a view to ensuring that victims of damage are compensated as promptly as possible; 8. to elect the members of the Assembly to be represented on the Executive Committee. 9. to establish any temporary or permanent subsidiary body it may consider to be necessary; 10. to determine which non-Contracting States and which inter-governmental and international non-governmental organizations shall be admitted to take part, without voting rights, in meetings of the Assembly, the Executive Committee, and subsidiary bodies; 11. to give instructions concerning the administration of the Fund to the Director, the Executive Committee and subsidiary bodies; 12. to review and approve the reports and activities of the Executive Committee; 13. to supervise the proper execution of the Convention and of its own decisions; 14. to perform such other functions as are allocated to it under the Convention or are otherwise necessary for the proper operation of the Fund.	
ARTICLE 32. **SESSIONS OF ASSEMBLY** 1. Regular sessions of the Assembly shall take place once every calendar year upon convocation by the Director; provided, however, that if the Assembly allocates to the Executive Committee the functions specified in article 31, paragraph 5, regular sessions of the Assembly shall be held once every two years. 2. Extraordinary sessions of the Assembly shall be convened by the Director at the request of the Executive Committee or of at least one-third of the members of the Assembly and may be convened on the Director's own initiative after consultation with the Chairman of the Assembly. The Director shall give members at least thirty days' notice of such sessions.	This article establishes the Assembly sessions.

ARTICLE 33. **QUORUM** A majority of the members of the Assembly shall constitute a quorum for its meetings.	
[other mechanical provisions as necessary]	
PART V **SETTLEMENT OF DISPUTES**	The following articles establish a disputes mechanism, modeled largely on the dispute settlement provisions of the Law of the Sea Convention, focused on an International Tribunal for the Protection of Biodiversity.
SECTION 1: GENERAL PROVISIONS	
ARTICLE 34. **OBLIGATION TO SETTLE DISPUTES BY PEACEFUL MEANS** Contracting Parties shall settle any dispute between them concerning the interpretation or application of this Protocol by peaceful means in accordance with article 2, paragraph 3, of the Charter of the United Nations and, to this end, shall seek a solution by the means indicated in article 33, paragraph 1, of the Charter	
ARTICLE 35. **SETTLEMENT OF DISPUTES BY ANY PEACEFUL MEANS CHOSEN BY THE PARTIES** Nothing in this Part impairs the right of any Contracting Parties to agree at any time to settle a dispute between them concerning the interpretation or application of this Protocol by any peaceful means of their own choice.	
ARTICLE 36. **PROCEDURE WHERE NO SETTLEMENT HAS BEEN REACHED BY THE PARTIES** 1. If the Contracting Parties which are parties to a dispute concerning the interpretation or application of this Protocol have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure . 2. If the parties have also agreed on a time limit, paragraph 1 applies only upon the expiration of that time-limit.	
ARTICLE 37. **OBLIGATION TO EXCHANGE VIEWS** 1. When a dispute arises between Contracting Parties concerning the interpretation or application of this Protocol, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiation or other peaceful means. 2. The parties shall also proceed expeditiously to an exchange of views where a procedure for the settlement of such a dispute has been terminated without a settlement or where a settlement has been reached and the circumstances require consultation regarding the manner of implementing the settlement.	

ARTICLE 38. **CONCILIATION** 1. A Contracting Party which is a party to a dispute concerning the interpretation or application of this Convention may invite the other party or parties to submit the dispute to conciliation under Annex II. 2. If the invitation is accepted and if the parties agree upon the conciliation procedure to be applied, any party may submit the dispute to that procedure. 3. If the invitation is not accepted or the parties do not agree upon the procedure, the conciliation proceedings shall be deemed to be terminated. 4. Unless the parties otherwise agree, when a dispute has been submitted to conciliation, the proceedings may be terminated only in accordance with the agreed conciliation procedure.	
SECTION 2: COMPULSORY PROCEDURES ENTAILING BINDING DECISIONS	
ARTICLE 39. **APPLICATION OF PROCEDURES UNDER THIS SECTION** Subject to section 3 of this Part, any dispute concerning the interpretation or application of this Protocol shall, where no settlement has been reached by recourse to section 1, be submitted at the request of any party to the dispute to the court or tribunal having jurisdiction under this section.	
ARTICLE 40. **CHOICE OF PROCEDURE** 1. When signing, ratifying or acceding to this Protocol or at any time thereafter, a Contracting Party shall be free to choose, by means of a written declaration, one or more of the following means for the settlement of disputes concerning the interpretation or application of this Convention: (a) the International Tribunal for the Protection of Biodiversity established in accordance with Annex III. (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex IV; (d) a special arbitral tribunal constituted in accordance with Annex IV for one or more of the categories of disputes specified therein. 2. A State Party, which is a party to a dispute not covered by a declaration in force, shall be deemed to have accepted the International Tribunal for the Protection of Diversity in accordance with Annex III. 3. If the parties to a dispute have accepted the same procedure for the settlement of the dispute, it may be submitted only to that procedure, unless the parties otherwise agree. 4. If the parties to a dispute have not accepted the same procedure for the settlement of the dispute, it may be submitted only to the International Tribunal for the Protection of Biodiversity in accordance with Annex III, unless the parties otherwise agree. 5. A declaration made under paragraph 1 shall remain in force until three months after notice of revocation has been deposited with the Secretary-General of the United Nations. 6. A new declaration, a notice of revocation or the expiry of a declaration does not in any way affect proceedings	

pending before a court or tribunal having jurisdiction under this article, unless the parties otherwise agree. 7. Declarations and notices referred to in this article shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the States Parties.	
ARTICLE 41. **JURISDICTION** 1. A court or tribunal referred to in article 40 shall have jurisdiction over any dispute concerning the interpretation or application of this Protocol which is submitted to it in accordance with this Part. 2. A court or tribunal referred to in article 40 shall also have jurisdiction over any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention, which is submitted to it in accordance with the agreement. 3. In the event of a dispute as to whether a court or tribunal has jurisdiction, the matter shall be settled by decision of that court or tribunal.	
ARTICLE 42. **EXPERTS** In any dispute involving scientific or technical matters, a court or tribunal exercising jurisdiction under this section may, at the request of a party or proprio motu, select in consultation with the parties no fewer than two scientific or technical experts chosen preferably from the relevant list prepared in accordance with Annex V, to sit with the court or tribunal but without the right to vote.	
ARTICLE 43. **PROVISIONAL MEASURES** 1. If a dispute has been duly submitted to a court or tribunal which considers that prima facie it has jurisdiction under this Part, the court or tribunal may prescribe any provisional measures which it considers appropriate under the circumstances to preserve the respective rights of the parties to the dispute or to prevent serious harm to biodiversity, pending the final decision. 2. Provisional measures may be modified or revoked as soon as the circumstances justifying them have changed or ceased to exist. 3. Provisional measures may be prescribed, modified or revoked under this article only at the request of a party to the dispute and after the parties have been given an opportunity to be heard. 4. The court or tribunal shall forthwith give notice to the parties to the dispute, and to such other Contracting Parties as it considers appropriate, of the prescription, modification or revocation of provisional measures. 5. Pending the constitution of an arbitral tribunal to which a dispute is being submitted under this section, any court or tribunal agreed upon by the parties or, failing such agreement within two weeks from the date of the request for provisional measures, the International Tribunal for the Protection of Biodiversity may prescribe, modify or revoke provisional measures in accordance with this article if it considers that prima facie the tribunal which is to be constituted would have jurisdiction and that the urgency of the situation so requires. Once constituted, the tribunal to which the dispute has been submitted may modify, revoke or affirm those provisional	

measures, acting in conformity with paragraphs 1 to 4. 6. The parties to the dispute shall comply promptly with any provisional measures prescribed under this article.	
ARTICLE 44. **ACCESS** 1. All the dispute settlement procedures specified in this Part shall be open to Contracting Parties. 2. The dispute settlement procedures specified in this Part shall be open to entities other than States Parties as specifically provided for in this Protocol or as provided in Rules passed by the Assembly under article 31	
ARTICLE 45. **APPLICABLE LAW** 1. A court or tribunal having jurisdiction under this section shall apply this Protocol and other rules of international law not incompatible with this Protocol. 2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case ex aequo et bono, if the parties so agree.	
ARTICLE 46. **PRELIMINARY PROCEEDINGS** 1. A court or tribunal provided for in article 40 to which an application is made in respect of a dispute referred to in article 39 shall determine at the request of a party, or may determine proprio motu, whether the claim constitutes an abuse of legal process or whether prima facie it is well founded. If the court or tribunal determines that the claim constitutes an abuse of legal process or is prima facie unfounded, it shall take no further action in the case. 2. Upon receipt of the application, the court or tribunal shall immediately notify the other party or parties of the application, and shall fix a reasonable time limit within which they may request it to make a determination in accordance with paragraph 1. 3. Nothing in this article affects the right of any party to a dispute to make preliminary objections in accordance with the applicable rules of procedure.	
ARTICLE 47. **EXHAUSTION OF LOCAL REMEDIES** Any dispute between Contracting Parties concerning the interpretation or application of this Protocol may be submitted to the procedures provided for in this section only after local remedies have been exhausted where this is required by international law.	

ARTICLE 48. **FINALITY AND BINDING FORCE OF DECISIONS** 1. Any decision rendered by a court or tribunal having jurisdiction under this section shall be final and shall be complied with by all the parties to the dispute. 2. Any such decision shall have no binding force except between the parties and in respect of that particular dispute.	
SECTION 3: LIMITATIONS AND EXCEPTIONS TO APPLICABILITY OF SECTION 2	
ARTICLE 49. **STATE RESPONSIBILITY** The Protocol shall not affect the rights and obligations of the Contracting Parties under the rules of general international law with respect to State responsibility.	
PART VI FINAL PROVISIONS	These articles establish final mechanical provisions.
ARTICLE 50. **RELATIONSHIP WITH THE CONVENTION** Except as otherwise provided in this Protocol, the provisions of the Convention relating to its protocols shall apply to this Protocol.	
ARTICLE 51. **ASSESSMENT AND REVIEW** The Conference of the Parties serving as the meeting of the Parties to this Protocol shall undertake, five years after the entry into force of this Protocol and at least every five years thereafter, an evaluation of the effectiveness of the Protocol, including an assessment of its procedures and annexes.	

ARTICLE 52. **SIGNATURE** This Protocol shall be open for signature at the United Nations Office at Nairobi by States and regional economic integration organizations from ___ to _____, and at United Nations Headquarters in New York from _____ to _____.	
ARTICLE 53. **ENTRY INTO FORCE** 1. This Protocol shall enter into force on the ninetieth day after the date of deposit of the [fiftieth] instrument of ratification, acceptance, approval or accession by States or regional economic integration organizations that are Parties to the Convention. 2. This Protocol shall enter into force for a State or regional economic integration organization that ratifies, accepts or approves this Protocol or accedes thereto after its entry into force pursuant to paragraph 1 above, on the ninetieth day after the date on which that State or regional economic integration organization deposits its instrument of ratification, acceptance, approval or accession, or on the date on which the Convention enters into force for that State or regional economic integration organization, whichever shall be the later. 3. For the purposes of paragraphs 1 and 2 above, any instrument deposited by a regional economic integration organization shall not be counted as additional to those deposited by member States of such organization.	
ARTICLE 54. **RESERVATIONS** No reservations may be made to this Protocol.	

ARTICLE 55. **WITHDRAWAL** 1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from the Protocol by giving written notification to the Depositary. 2. Any such withdrawal shall take place upon expiry of one year after the date of its receipt by the Depositary, or on such later date as may be specified in the notification of the withdrawal.	
ARTICLE 56. **AUTHENTIC TEXTS** The original of this Protocol, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.	

Annex I

1. Minimum limits of insurance, bonds or other financial guarantees covering their liability under article 4 (Reference article 18)
2. Minimum amount of export of LMOs to qualify for contributions to the Fund. (Reference article 26)
3. Initial contributions for each Contracting Party (Reference article 27.1.)
4. Total amount for aggregate claims against Fund (Reference article 28.1(b))
5. Total amount for aggregate claims against Fund (Reference article 28.1(c))
6. Annual contribution (Reference article 28.2)

Annex II Conciliation Procedure [see Law of the Sea Convention Annex V] (reference article 38)
Annex III International Tribunal for the Protection of Biodiversity (reference article 40)
Annex IV Arbitral tribunal (reference art 42.)
Annex V List of Experts (reference art 42)
Annex VI Maximum amount payable under Fund under article 21

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INTERNATIONAL GRAIN TRADE COALITION (IGTC) [6 OCTOBER 2006]
[SUBMISSION: ENGLISH]

KEY ISSUES FOR CONSIDERATION
29 September 2006

I. Introduction

The IGTC recognizes the objective of the Protocol is to introduce regulatory control over the transboundary movement of products of modern biotechnology that may have an adverse effect on the conservation and sustainable use of biological diversity. However, the IGTC has serious concerns about the Protocol's potential impact on the capability and cost of moving globally the large volumes of food and feed crops required to meet the world's demands each year for a nutritious and affordable food supply.

II. The Implications of an International System of Liability and Redress on the International Grain Trade

The size, complexity and number of parties involved in the international grain trade, illustrate that caution should be exercised in developing and implementing an international system of liability and redress. Disruption in the grain trade would be devastating for millions of farmers around the world; hundreds of thousands of businesses (and their employees) that rely on their ability to economically buy and/or sell grain; thousands of businesses (and their employees) that are actually involved in the grain trade; and hundreds of millions of consumers around the world whose food security depends on products that have, at some point in their life cycle, traveled internationally.

The IGTC understands and appreciates that no one involved in proposing or establishing the rules on liability and redress seeks to undermine current international commerce in trading grains. Nevertheless, the trading system is so diverse and so intricate that unanticipated adverse consequences to the shipment of raw grains and food around the world should be of concern to everyone involved in this process. This is the context in which the IGTC provides these comments related to the issue of Liability and Redress.

Key Recommendations:-

III. The Nature of the Liability

In determining liability, exporters and shippers of grains, oilseeds and pulses that have been produced with modern technology should comply with their contractual and legal (for example record keeping, testing and labeling obligations).

However:-

- Liability for shippers should only extend if they are negligent or engaged in wrong doing in the context of shipping the products that may contain LMOs intended for food, feed or processing.

- Exporters/importers should only be responsible for releases of LMOs that they cause or negligently permit to happen and that cause significant harm to the conservation and sustainable use of biodiversity.

- It is important that government officials from all States understand that exporters and shippers should not be responsible for the intentional or inadvertent misconduct of another party.

- For this reason, the standard of liability for LMO shipments of food or feed, whether or not there is to be further processing, must be fault-based. There should be no liability for any party that has not acted intentionally illegally, or been negligent, or failed to exercise reasonable diligence or due care.

- The exercise of due care and following of best practices should always be a defense against liability claims. There should be no absolute or strict liability, as such a regime would impose unmanageable and unknowable risks on all parties in a global, bulk commodity shipment environment.

- It is imperative that there be commercial predictability in order for the grain trade to continue to function in a way that ensuring food and feed are available around the world.

IV. The Limits of Liability

Where would liability arise from and what if any limitations should there be.

- The IGTC does not believe that the actual transboundary movement itself of LMOs is an appropriate focal point for the international rules and procedures referred to in Article 27 of the Protocol.

- Such rules and procedures should apply to damage that may occur subsequent to the transboundary movement,

    - Those parties that are proven to be actually at fault for the damage, such as a domestic user who diverts an LMO shipment for non-food, non-feed or non-processing purposes or who does not exert sufficient care during transportation from discharge to the point of use would be liable.

    - It is also important that any actual damage to the conservation and sustainable use of biodiversity meets a legal threshold of significant, rather than de minimus, damage to trigger application of any international rules and procedures developed under the Protocol.

    - Damage under Article 27 should mean damage to biodiversity, or a change in variability among species, where such change is also adverse and significant.

    - Any rules adopted pursuant to the Protocol should be consistent with similar rules and definitions under the Convention on Biological Diversity to avoid any conflicts or divergent interpretations.

- Liability, if any, should be channeled to those who are directly at fault, and apportioned among jointly liable parties in relation to their respective levels of responsibility and degrees of fault.

- Exporters and transporters who comply with their labeling and other obligations, but do not develop the technology, produce the products, or decide how the products get used when they reach the importing country, should not have liability.

- Exporters and transporters could be partially responsible if they are knowing parties to an improper shipment, or an improper diversion of products, or negligent in connection with an accident that causes significant adverse change in variability among species.

- The liability and redress rules under the Protocol should only be used if there is significant species damage.

  - Where current international and contractual rules provide for liability, these should remain the remedy with no new regimes necessary to ensure the "victim" is adequately compensated.

- The IGTC strongly believes that there should be a statute of limitations requiring actions to be brought within a reasonable amount of time after the event, probably three years from the incident leading to the damage.

- Domestic legal systems as well as international environmental conventions typically include such statutes of limitation. Such a period promotes vigilance and care by potential claimants, results in fewer evidentiary problems, provides predictability, and enhances the possibility that participants in the trade may find available insurance coverage.

- Valuation of Damage
  With respect to damage valuation, damages recoverable under the Protocol should be limited to a change in variability among species where this has an adverse effect on biodiversity. This is consistent with the scope and authority of the Protocol. Adoption of a more expansive view of the definition of damage would be beyond the scope of the Protocol, potentially subjecting the system of liability and redress to enforcement challenges. The Protocol addresses the conservation and sustainable use of biological diversity, and accordingly the system of liability and redress under the Protocol should be crafted carefully to address damage to biodiversity, including reasonable costs of response actions reasonably taken.

- For the system to maintain credibility and support among its stakeholders, any particular damage to biodiversity should not be actionable unless it has the following minimum characteristics:

  - Objectively and scientifically measurable, i.e., measured against a scientifically established baseline;

  - Adverse;

  - Significant; and

  - Permanent, i.e., not self-correcting over a reasonable period of time

- Liability for any such damage should be reduced to the extent appropriate to provide an incentive to a damaged party to prevent or mitigate any further damage to the biodiversity once the initial damage is discovered or reasonably should have been discovered.

- There should also be a maximum claim that any person or entity could bring. Such a liability limitation would strike a balance between holding persons responsible for the harm they may cause, and avoiding legal consequences that severely disrupt the trade, deter advances in technology, or other wise undermine the ability to ship and receive food and grain worldwide.

- The IGTC believes that the maximum liability under the Protocol should be no more than twice the value of the cargo itself. Otherwise, the potential liability will be seen as unlimited, and insurance for the shipments will be unattainable. If that were to occur, trade would be severely disrupted, if not halted completely.

V. The Nature of Proceedings to Determine Liability

- The Protocol is a treaty among States. Because only States are signatories, disputes arising directly under the Protocol should involve States that have adopted the treaty.

- Additionally every signatory state, will implement the treaty slightly differently within its own borders. Accordingly, existing legal mechanisms should not be changed under any liability and redress rules adopted within the framework of the Protocol.

- As part of the internationalization of the administration of justice, States have entered into a multiplicity of treaties by which they provide for the recognition in each other's courts of judgments pronounced by other parties to the treaty, and for subsequent enforcement of those judgments.

- The World Trade Organization ("WTO") is an international forum where member governments negotiate and implement trade agreements and settle disputes that arise under those agreements. The WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes establishes a system for the resolution of trade disputes that arise between member governments. This is a forum that could be utilized to resolve government-to-government disputes under the Protocol.

- However, non-governmental entities are not subject to the jurisdiction of the WTO, and neither the WTO nor any other international body is the proper venue for disputes involving private parties. Such disputes, if they arise, should be resolved through existing legal channels.

PUBLIC RESEARCH AND REGULATION INITIATIVE (PRRI) [2 OCTOBER 2006] [SUBMISSION: ENGLISH]

This paper responds to the invitation to submit views in the form of Operational Texts on issues addressed by the Open Ended *ad hoc* Working Group on Liability and Redress (Article 27 of the Protocol), in particular with respect to the approaches, options and issues identified in Annex II of UNEP/CBD/BS/COP-MOP/3/10.

The provision of 'operational text' addressing the issues of liability and redress to the Working Group remains a problem for many reasons, primarily as:

1. Such operational text hides many concepts and concerns that need, at this stage, to be addressed and properly considered. The explanatory given alongside the operational text needs therefore to be retained, particularly to ensure that guidance can properly be written.

2. The manner in which 'operational text' is drafted will crucially depend on the choice of guidance document or legally binding instrument that might be proposed to the Meeting of the Parties to the Protocol. Whether or not a legally binding agreement is proposed, guidance will have to be provided and commentary on the text will be necessary. Article 27 requires that the process considers the elaboration of rules and procedures, which may be more diffuse than legally binding agreements. The many decisions affected by this will include *inter alia*

- Choice of Instrument (Section XI)
- Administrative Approaches (Section IV.A(d))
- Non-binding Approaches (Section XI. Option 3)
- Capacity Building Measures (Section X)
- Possible Elements of an International Liability Rules and Procedures (civil and/or state liability) (other remaining sections)

3. There remain many issues of principle that need consideration before text is agreed including

- What are the limitations imposed by the Scope of the Protocol (Article 4) and the scope of Article 27 for any new agreement.
- The definition and causes of adverse effects (damage) and whether to take into account other issues than damage to the conservation and sustainable use of biological diversity caused by LMOs subject to transboundary movement, taking
  also into account risks to human health
- Whether adverse effects on biodiversity include those on agricultural biodiversity
- There needs to be a very clear understanding of 'resulting from transboundary movement'. This is important, as adverse effects may be recognised immediately
  and directly but also may be indirect and delayed. In some instances this will make it difficult to assign a connection to particular users of the technology or particular Parties from whose territory the transboundary movement originated.
- Should all adverse effects be remedied? Changing agricultural practice may have adverse effects on biodiversity but the action may be taken deliberately and its effects known.
- If a product has undergone a strict risk assessment and risk management process
  and is deemed to have minimal risk, should any adverse effect be 'corrected' and
  should some person be designated liable for unforeseeable harm?

4. The practice of agriculture may cause adverse effects to both agricultural and environmental biodiversity. Should a new instrument require redress only if these adverse effects can be shown to be associated with living modified organisms? How do we effectively separate 'harm' from changes

associated with progress. The depletion of the range of genetic diverse varieties of crop plants is a serious loss of agricultural biodiversity that naturally results when high-yielding new varieties with desired characteristics are chosen by farmers. This needs to be addressed, but not by disallowing farmers to use the newer (better?) varieties. Changing crops may have a significant effect on local biodiversity – which could be termed harm. The reasons for changing crops may be diverse and may include the possibility that a modified variety is better suited than old varieties to the agronomic conditions.

5. Apportionment:

Where 'damage' is identified for which there may be many causes how should liability be assigned, assuming redress is needed? Agricultural practice may have changed because of the availability of new products, associated with GM products that introduce new traits, concomitant with the introduction of the new products or simply introduced at approximately the same time as GM products. Should the presence of a GM crop in the vicinity of identified adverse effects lead to an assumption that this is the cause, regardless of whether the gene or genes that are inserted into the new products are detectable, or even where they are detectable, should this constitute *prima facie* evidence of causality? Apportionment of 'blame' between many different causal effects needs careful consideration. The system introduced should be non-discriminatory – "non-discrimination means that comparable situations should not be treated differently, and that different situations should not be treated in the same way, unless there are objective grounds for doing so"1

6. Proportionality:

Although LMOs have been grown for over 10 years in many locations around the world no damage of any kind either to the environment or to human health has been identified as having been caused due to them having been modified using modern genetic techniques. New products that change the response of the crops to stress or include new pharmacologically active compounds may pose greater challenges than first generation LMOs. The systems put in place to assure their safe use and to ensure that there are redress mechanisms where harm occurs should be proportional to the risk of harm being caused. "Proportionality means tailoring measures to the chosen level of protection. Risk can rarely be reduced to zero, but incomplete risk assessments may greatly reduce the range of options open to risk managers."2

Systems should not be put into place that deny the rights of societies and individuals "to share in scientific advancement and its benefits" (Universal Declaration of Human Rights, 1948 – Article 27(1)) unless the scientific advancement poses great risk to the environment or to the health of individuals.

7. Public research for the public good – the role of positive effects on human health and the environment. An important consideration in this context is that Public research groups in government institutes, academia and international organisations in developed and developing countries all over the world dedicate their knowledge, time and resources conducting research to strengthen sustainable production of food, feed and fibre; overcome limiting resources such as water; improve health care; and preserve the environment. Disproportionate liability systems that do not take these positive effects on human well being into account could effectively stop all public research in this field.

1 European Union (2000) Communication from the Commission on the precautionary principle COM/2000/0001 final

2 ibid

PRRI believes that this kind of fundamental questions needs to be discussed first, before a well informed choice can be made whether 'international rules and procedures in the field of liability and redress' would best take the form of Guidelines, an Arbitration and Dispute Settlement mechanism, Trans-national Process Rules, Administrative Approaches or an internationally binding agreement. PRRI is of the view that each of these each approaches need to be considered separately and in full detail so that the Parties can make a well informed decision. As explained in our earlier submission, PRRI believes that a legally binding regime in this field is unlikely to work, and that the preferred option would be to start developing guidelines which would help countries to
review and - where necessary - revise their national systems.

It is with this background that PRRI offers below the 'operational text' to be used as input for the discussion on the above fundamental issues. In that text, the term "instrument' is used in the sense that it refers any guidance document or legally binding instrument that may be produced as a result of the work of the group.

Section I.B.

"This instrument shall apply to adverse effects of living modified organisms resulting from intentional or unintentional transboundary movement on the conservation and sustainable use of biodiversity"

> Adverse effects are used here both because that is the wording of the objective of the protocol and because it permits the use of administrative measures that are usually much wider and according to the literature of economic analysis of law they are in general more efficient than liability rules in terms of risk control.

Section II.A.

"Damage to biodiversity is any damage that has significant adverse effects on the conservation of biodiversity in a particular place, but does not include damage resulting from those actions expressly authorised or required by a relevant national authority."

It is important to remain aware of the ingoing debate on this issue under the CBD.

"Except where national law extends this instrument, damage to private property shall not be within the scope of this instrument"

Section IV. Channelling of Liability, Role of Parties of Import and Export, Standard of Liability

Transboundary movements of LMOs are not acts that are prohibited by international law. State responsibility may not be appropriate.

However, where damage occurs which could have been prevented had a Party met its obligations under the Protocol, that Party should be liable for that damage.

Hence,

State Responsibility:

"A Party shall be liable for damage to the conservation and sustainable use of biodiversity due to LMOs resulting from any breach of its obligations under the Protocol"

Civil Responsibility:

"The legal or natural person(s) that can be shown to have caused damage to the conservation or sustainable use of biodiversity due to the handling and use of living modified organisms which have been subject to transboundary movement shall be held liable"

This statement does not require fault or negligence to be proved. Mechanisms for redress would spring into effect regardless of fault or negligent action or omission.

Where damage to other persons or private property occurs, redress should be through the national system providing for liability in these instances. However, where damage to the conservation and sustainable use of biodiversity occurs, a mechanism for deciding on liability is essential. There are a number of ways of doing this. In the first instance, it may be that a 'fault based' approach would allow for redress:

"liability shall be established if a person has breached a legal duty of care through intentional or negligent conduct that results in damage that could have been foreseen (including acts or omissions) and the breach has resulted in actual damage."

It is a standard practice of fault-based liability regimes to require the causation between damage and negligent act to be proved by the plaintiff to sustain liability, however, due to the complexity of natural processes, it will be very difficult to build the causal link, as normally there will be some other contributory factors involved in the whole process, and the effects may be both delayed and indirect. The legal problem of causation found in cases involving 'new' risks of technical and chemical production is often mitigated by modifying the evidence requirements (diminishing the standard of proof for causation) or to shift from the all-or-nothing principle in the law of damages to proportional liability.:

It may therefore be more sensible to move to a system of strict liability similar to that used for product liability law where the causal link is assumed and the person deemed responsible would have to show that no causal link between their activities and the damage exists:

Strict liability

"There should be considered a causal link between the damage and the act or omission of a person with operational control of the LMO if he fails to fulfil his obligations set by the applicable laws or approval procedures, unless he can prove otherwise"

However

"liability shall not attach to activities that where harm could not have been foreseen given scientific and technical knowledge at the time they were carried out as determined by the risk assessments undertaken in conjunction with approval or authorisation of the activity under national law of both the exporting and importing country. Where information becomes available after approval or authorisation which indicates a possible adverse effect, operators would need to take such action as may be necessary in order to minimise the effects, and to inform national authorities"

In addition, it would be necessary to ensure that redress is accomplished whether or not a 'guilty' party can be established. Hence a Party must be able to take action to correct a problem and then attempt to identify those responsible.

"the Party in which the damage occurs shall assume responsibility for any necessary restoration or other remedial action in accordance with its obligations under the Convention on Biological Diversity where necessary and may then recover the costs of such action from the person(s) responsible".

Multicausality:

Multi-causality should be distinguished from partial causation, which leads to pro-rata liability while the legal consequence of multi-causality is joint and several liability.

There are three types of multi-causal damage:
(1) complementary (or cumulative) causation, damage occurs only through the concurrent of tortuous acts by two or more causes. On its own, any one of the independent tortuous acts would have been without consequence;
(2) alternative causation, only one of several actors actually caused the damage. However, it is not possible to determine who it was;
(3) Additive causation, a person or property is damaged through the independent tortuous acts of two or more persons leading to indivisible harm.

2. It suggests that there are no evidentiary difficulties of divisible harm. In fact, difficulty often occurs, especially in environmental damage, the share of the individual tortfeasor cannot be determined or the plaintiff does not feel able to quantify it.

3. It suggests that joint and several liability only applies to indivisible harm.

To correct the evidentiary difficulties of divisible harm, joint and several liability has been used as one of the solutions under environmental law cases both in Germany and America. It may be that this could be solved through the estimation of damage being eased by requiring an evidentiary burden of predominant probability or liability might be shared equally. In some cases, internal adjustment among the debtors would be allowed.

There is a problem, however, as it is not only where there are many different persons working with an individual LMO, but that the causes may not be associated with the LMO at all, but with other changes in the environment. In that event, it seems likely that a fair compromise would be "In the case of liability with multiple causes, liability shall be apportioned on the basis of relative degrees of fault where possible"

Section V. Limitation of Liability

This represents a difficult area, as
• It may need to be related to the transboundary movement, which may be unintentional, and
• it needs to recognise that indirect, delayed effects could manifest themselves over a very long time period.

"Any claim for damage to biodiversity shall be brought within three years from the date the damage is identified or reasonably could have been identified but shall in no case be recognized if not brought within twenty years of the transboundary movement that caused the damage occurred unless it can be shown that the damage could not have been identified within the twenty year period."

As before, the PRRI stands ready to assist in this difficult task by making available to you and to the working group the wealth of scientific knowledge and experience in our group.
